134-84

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1421

WILLIAM D. McKEY, PLAINTIFF IN ERROR,

vs.

THE VILLAGE OF HYDE PARK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 19, 1889.

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1-6 UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the United States Circuit Court for the Northern District of Illinois, to the March Term, A. D. 1887.

WILLIAM D. McKEY }
vs. } Ejectment. Gen. No. 20448.
THE VILLAGE OF HYDE PARK. }

William D. McKey, who is a citizen of the State of Wisconsin, plaintiff in this suit, by Doolittle & McKey, his attorneys, comes and complains of The Village of Hyde Park, in the county of Cook and State of Illinois, a municipal corporation organized under the laws of Illinois and a citizen of the State of Illinois, defendant, who has been summoned, according to the form of the statute of Illinois in such case made and provided, in the plea of ejectment—

For that whereas the said plaintiff, on the first day of January, 1886, was possessed of a certain parcel of real estate, with the appurtenances, situated in said village of Hyde Park, in the county of Cook aforesaid, and known and described as follows, to wit, lot numbered eleven (11) and the south two and fifty-hundredths (2.50) feet of lot ten (10), all in block one (1), in McKey's Addition to Hyde Park, said McKey's Addition being a subdivision of that part of the south ten (10) acres of the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section three (3), town. thirty-eight (38) north, range fourteen (14) east, of the third principal meridian, lying west of the west
7 line of Vincennes avenue, together with lots thirteen (13) to twenty-three (23), both inclusive, in block six (6), in Cleaverville Addition, a subdivision in the northeast quarter (N. E. ¼) of section three (3) aforesaid.

And for that whereas also the said plaintiff, on the first day of January, 1886, was possessed of a certain other parcel of real estate, with the appurtenances, situated in said village of Hyde Park, in the county of Cook aforesaid, and known, described, and bounded as follows, to wit: Commencing at a point in the line of the east line of the Grand Boulevard at a point thirty-three (33) feet north of the south line of the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section three (3), town. thirty-eight (38) north, range fourteen (14) east, of the third principal meridian, and running thence north along the east line of the said boulevard twenty-three feet (23) feet; running thence east parallel with the south line of the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of said section one hundred and fifty (150) feet; running thence south and perpendicular to the last-mentioned line twenty-three (23) feet, and running thence west, on a line parallel with the south line of the northwest quarter of the northeast

quarter of section three aforesaid, one hundred and fifty (150) feet to the place of beginning.

And for that whereas also the said plaintiff, on the first day of January, 1886, was possessed of a certain other parcel of real estate, with the appurtenances, situated in said village of Hyde Park, in the county of Cook aforesaid, and known and described as follows, to wit:

8 All that part of lots ten (10) and eleven (11), in block one (1), of McKey's Addition to Hyde Park lying south of a line thirty-three (33) feet north of and parallel to a straight line drawn from a point in the west line of the northeast quarter (N. E. ¼) of section three (3), town. thirty-eight (38) north, range fourteen (14) east, of the third principal meridian, midway between the northwest and the southwest corners of said quarter section, to a point in the east line of said quarter section midway between the northeast and the southeast corners of said quarter section, being the south twenty-three (23) feet of said lots ten and eleven, said McKey's Addition to Hyde Park, being a subdivision of that part of the south ten (10) acres of the northwest quarter of said northeast quarter lying west of the west line of Vincennes avenue, together with lots thirteen (13) to twenty-three (23), both inclusive, of block six (6), in Cleaverville Addition, a subdivision in said northeast quarter.

Which said premises the said plaintiff claims in fee simple absolute; and the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit, on the first day of January, 1887, entered into the said premises and ejected the said plaintiff therefrom, and unlawfully withholds from the said plaintiff the possession thereof, to the damage of the said plaintiff of one thousand dollars; and therefore he brings his suit.

DOOLITTLE & McKEY, *Pl'ff's Att'ys.*

Endorsed: Filed Feb'y 25, 1887. Wm. H. Bradley, clerk.

Afterwards, to wit, on the second day of March, 1887,
9–17 came the defendant, by its attorney, and filed in said clerk's office its plea in said entitled cause; which said plea is in the words and figures following, to wit:

In the U. S. Circuit Court, to the March Term, A. D. 1887.

VILLAGE OF HYDE PARK *ats.* WILLIAM D. McKEY. } Ejectment. 2448, 797.

And the defendant, by Henry V. Freeman, its attorney, comes and defends the wrong and injury, when, etc., and says that it is not guilty of unlawfully withholding the tenements in the said declaration mentioned, or any part thereof, in manner and form as the plaintiff has above thereof complained against it; and of this the defendant puts itself upon the country, etc.

HENRY V. FREEMAN, *Def't's. Att'y.*

Endorsed: Filed March 2, 1887. Wm. H. Bradley, clerk.

* * * * * * *

18&19 Afterward, to wit, on the fourteenth day of December, in the adjourned October term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM D. McKEY
vs.
THE VILLAGE OF HYDE PARK. } Ejectment.

Now come the parties, by their attorneys, and, upon issue joined, thereupon comes a jury of good and lawful men, to wit, William Hall, John A. Caruthers, H. S. Stoddard, Pike Derneer, James Newcomer, Cassius Perry, Bernhard Glavey, Charles Stephen, Timothy Hall, E. A. Worrell, B. T. Butler, and B. H. Nichols, who were all duly elected, tried, and sworn well and truly to try said issue; and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

* * * * * * *

20–29 Afterward, to wit, on the seventeenth day of December, in the December term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM D. McKEY
vs.
THE VILLAGE OF HYDE PARK. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn; and, after receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the defendant not guilty.

* * * * * * *

30–37 Afterward, to wit, on the second day of February, 1889, in the December term of said court, 1888, in the record of the proceedings thereof in the said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

WILLIAM D. McKEY
vs.
THE VILLAGE OF HYDE PARK. } Ejectment.

Now come the parties by their attorneys, and now comes on to be heard the motion of the plaintiff for a new trial herein; and, after hearing the arguments of the counsel, the court, being fully advised in the premises, overrules said motion and awards judgment. It is thereupon considered and adjudged by the court that said defendant be discharged, and that it go hence without day, and that it have and recover of said plaintiff its costs about its defense in this behalf expended, and that it have execution therefor; and on motion of the plaintiff, by his attorney, the time is extended thirty days to file a bill of exceptions herein.

* * * * * * *

38 Afterward, to wit, on the nineteenth day of September, 1889, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, William D. McKey, of the county of Cook and State of Illinois, as principal, and Henry McKey, of the same place, as surety, are held and firmly bound unto the Village of Hyde Park and its successors in the full and just sum of one thousand dollars ($1,000.00), to be paid to the said Village of Hyde Park, its successors, and its certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-nine (A. D. 1889).

Whereas lately, at a term of the circuit court of the United States for the northern district of Illinois, in a suit depending in said court between the said William D. McKey, as plaintiff, and the said Village of Hyde Park, as defendant, judgment was rendered against the said William D. McKey and in favor of the said Village of Hyde Park on the second day of February, A. D. 1889; and the said
39 & 40 William D. McKey, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Village of Hyde Park, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said William D. McKey shall prosecute his said writ of error to effect

and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM D. McKEY. [SEAL.]
HENRY McKEY. [SEAL.]

Sealed and delivered in presence of—
F. L. ALLEN.
SAMUEL B. KING.

Approved by—

MELVILLE W. FULLER,
Chief Justice & Acting Circuit Justice, 7th Circuit.

(Endorsed:) Filed Sept. 19, 1889. Wm. H. Bradley, clerk.

* * * * * * *

40½ UNITED STATES OF AMERICA,
Northern District of Illinois:

In the Circuit Court of the United States in and for said District.

WILLIAM D. McKEY
vs.
THE VILLAGE OF HYDE PARK. } Gen. No. 20448. Term No. 366.

Appearances: Messrs. Doolittle & McKey, for the plaintiff; J. R. Mann and Henry V. Freeman, Esquires, for the defendant.

Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause at the December term, A. D. 1888, of the circuit court of the United States for the northern district of Illinois, before a jury—the Hon. Walter Q. Gresham presiding as judge of said court—the plaintiff, to maintain the issues on his part, introduced the following testimony:

A warranty deed, dated June 1st, 1866, recorded June 5, 1866, from Edward C. Cleaver and wife to Edward McKey and Michael McKey of the south ten acres of the northwest quarter of the
41 northeast quarter of section 3, town. 38, range 14, in Cook county.

Also an examined copy of a decree of the circuit court of Cook county, Illinois, rendered May 25th, 1882.

And also a final decree in the same cause, entered October 6th, 1882.

Also a plat entitled "McKey's Addition to Hyde Park," recorded October 6th, 1882, which plat was a part of the final decree.

And the counsel for the plaintiff thereupon read from said final decree as follows:

"It appearing to the court that the plat in said report attached,

marked 'E,' which said commissioners have entitled 'McKey's Addition to Hyde Park,' being a subdivision made by circuit court commissioners in partition of that part of the south ten acres of the northwest quarter, etc., represents their subdivision of the land above described under description No. 5, and was by them duly submitted to the president and board of trustees of said village of Hyde Park, and was approved by them on the eighth of September, A. D. 1882, as appears by the certificate of the clerk of said village thereon, the pieces or parcels of land designated on this plat 'E' as streets and alleys being laid out for public streets and alleys as on said plat 'E' shown.

"It is further ordered, adjudged, and decreed that the several maps or plats by said commissioners prepared and the subdivision by them made and shown thereon and the respective titles given thereto be, and the same are hereby, in all respects approved, ratified, and confirmed, and it is ordered that the originals now here in
42 court be recorded in the recorder's office of said Cook county, as required by law.

"And it is further ordered that the clerk of this court certify, under his hand and seal of this court, on each of said original maps or plats a minute of the order of this court approving the same, in words and figures as follows, to wit:

"STATE OF ILLINOIS, } ss:
County of Cook, }

"This plat approved in all particulars by the court; and it is ordered that the same be recorded in the recorder's office of the county of Cook aforesaid. This certificate is made in pursuance of a decree of the circuit court of Cook county, in the State of Illinois, entered on the 6th day of October, 1882, in case number 39801, in which William D. McKey and others are complainants and Richard M. McKey and others are defendants."

It is admitted that the defendant, The Village of Hyde Park, was not a party to the above suit.

Said plat made under said decree was presented in evidence, marked Exhibit "D" in this cause, and a copy of which is as follows:

(Here follows diagram marked Exhibit D, p. 43.

44 Henry J. Goodrich, a witness for the plaintiff, testified to his signature upon the plat, and that he was one of the commissioners appointed by the court to make the partition, and was at the same time president of the board of trustees of the village of Hyde Park; that he knew where the stakes were driven by the surveyors who made the plat, and he knew that the land as staked took 23 feet off the street; that at the time the board approved the plat they knew it was taking more land than what "was intended to be given;" that they wanted to change the street; they wanted to leave that question in court and approve of the plat as it then

stood; that the board was then in favor of changing the location of that street.

The witness further testified that he had known that land ever since 1865 or '66, and that it was then enclosed with a fence; that the fence was an old fence; that the fence was south of the center line of the street as opened by the authorities of Hyde Park; that he remembered the circumstance of a street being run through there. How far the fence was south of the center of the street witness could not state. It was admitted by stipulation of counsel that 41st street was opened through the property in question in 1873.

On cross-examination the witness testified that he was an agent for Mr. Gaylord and others in the property of the McKey estate, situated farther south, but not this property, and that he had been acting at that time as a real-estate broker, more or less, for the McKeys in property located at 47th street. "I acted very often for Henry McKey as real-estate broker. I do not know how I came to be appointed commissioner in the partition, only I had lived
45 there and was conversant with the property and had sold property for them." Witness presumed they selected him for that reason; he knew no other.

"After this property was subdivided, probably six or eight months after, I took some of the property to sell for the McKeys, and did sell some of it. I got commissions upon property which I sold."

Witness further testified that at the time the plat was presented to the board of trustees he thought there was a dispute as to the southern boundary line of this northwest quarter. An abstract of title was presented or sent to the board of trustees, and the question arose as to the matter of taking any action in regard to the approval of the partition; that there was a dispute in regard to some sixteen feet of ground it would take off, and the board thought they would let the matter go into court and be settled there, and that they would approve the plat as it stood, but that they did not intend to settle the dispute in the board, and they approved the plat and left the question as to the boundary line open at the time the plat was approved. It showed the south 33 feet of the McKey tract as dedicated for a street, and it was stated by the members of the board that they would approve this plat as it came from the court, and if there was any question in regard to the correct lines of the street that was to be settled as a matter of law by subsequent adjudication.

Witness further testified on redirect examination that his firm was not employed to make the sale of McKey's Addition to
46 Hyde Park, but that his firm did sell and received commissions for the selling of one or two lots; that the custom was, when a plat was sent to the board of trustees, it was referred to a committee to examine the title and report whether they would approve or not, and that in the examination in the committee he had conversations with Mr. Leonard, one of the committee, about the plat, and the question arose in regard to it and was talked over.

Alexander Taylor, a witness for the plaintiff, testified that he resided very near this property and had known it ever since 1869; that he lived nineteen years in Hyde Park and in the vicinity of this

property. The house he lived in would be about 200 feet north of the line in dispute, and that for eighteen years he had lived near the property, and at one time had lived on that part of it which is east of Vincennes avenue.

He testified that it was always fenced in until the time it was opened as a street, in 1873. There was a fence on the south line of it in 1869, which was quite an old fence then and which the gardener made into a reed fence to give shelter to his garden from the north winds, and on the south side of it was the Bowen lot, cultivated as a vegetable garden; on the north side it was also inclosed. There was no fence on the north side of the ten-acre lot deeded to the McKeys, but the whole piece up to the railroad, including Mr. Hill's land and Mrs. Smith's land, was all fenced in together. One-half of it belonged to the McKey estate and one-half belonged to
47 Mrs. Smith and Mr. Hill, but it was inclosed on all sides and was used for a pasture by the witness. The fence on the south line between the McKey land and the Bowen land was an old fence, which used to blow down; the pressure of the wind would break it down, and he had to patch it up. It was an old fence in 1869, made on cedar posts, a straight fence running through from Vincennes avenue to Grand Boulevard. The wind would blow it down sometimes three or four lengths at a time.

When the street was put through and the fence was moved south they turned the tops of the fence into the ground; they were so rotten they could not use them again. When the street was put through the fence was moved south into Mr. De Lat's garden. It was moved a distance of six rows of cabbages—I should judge about nine or ten feet, the cabbages being about eighteen inches apart or so, in rows. Mr. McKey had a great time. I recollect all about it, because I was living right across the street, and they had a great time determining whether they would pay for the cabbages or not.

The fence was moved onto the south line as laid out by Hyde Park, and that is where the fence now stands, about eight or ten feet south of where it stood before. A little ditch was dug by the north side of the fence to drain the water off; it ran into Grand Boulevard and crossed over where the slough was. The line to which the fence was moved is contended by the village of Hyde Park to be the south line of the street as laid out by the village.

The north line of the sidewalk is three and one-half feet
48 south of where the old fence stood. You can dig down in that part now and get the posts. The post-holes are right there yet.

After the fence was moved the land on the north side, the McKey land, was not fenced again until a Mr. English put a little old post up there and some barbed wire as a break for cattle getting into his garden. English had leased of the McKey estate and had a house and a barn and a garden, but it was only temporarily fenced to keep cattle off; it was not a regular fence. The posts were about twenty feet apart, and some barbed wire on them. I mean by the "opening" of the street that it was graded up; it was thrown up from the ditches into a street.

On his cross-examination he testified that he did not know how long the tract of land south had been used for a garden. He did know of its being used five years by De Lat, but he did not know how long he was there before. It was in use when he first moved there, in 1869, and it had been two or three years before that. It had the appearance of having been used for garden purposes for some time at that time; that when the street was located through there most of the street was located north of the old fence, and subsequently the McKey heirs or the McKey estate rented the property to him; that it was away back in 1880 that they rented it to English for a vegetable garden. That was a long time after the street was opened—seven or eight years—when he put a fence along there; it was not an exact fence; a few oak trees were chopped down
49 and put where they would be able to keep the cattle off; it was for the purpose of turning away the cattle. Mr. English wanted to get all the land he could, and he put that fence against the very edge of the street. There was no room for any sidewalk out there by reason of the excavation. It was right close up to the edge of the street. This was also in 1880 or 1881.

Witness testified that he was familiar with this land long before that; that he was familiar with that land when the street was put through, and long before that; that he lived right there. The land had never been fenced after the opening of the street until English went on it. It had not been plowed or touched by anybody until English went there, after the street was opened through. Previous to the street opening witness had used it as a pasture.

Frank McLeane, a witness, testified that when the street was run through the land on the north side was enclosed, fenced in; that he worked for De Lat, the gardener; that when the street was run through the fence was taken down and run back onto Mr. De Lat's ground; he didn't measure how far, but thinks about fifteen feet, or something like that. It was a long time ago. It was an old fence. We used to repair it once or twice a year. Some of the posts were rotten off. They were cedar posts. This fence ran straight through from Vincennes avenue to Grand Boulevard. The land north of the fence was fenced all around.

50 On his cross-examination he testified that he worked there two summers—the summer before the fire and the summer before that. Before that time he had lived on Vincennes avenue, boarding with his sister.

The land on the south side of the fence was Bowen's land, on which the garden was. He did not know how long it had been used as a garden. The fence was there before De Lat, and had reed mats laid up along it to break the wind. There had been somebody there before De Lat. The man that run the garden then did not build the fence. The fence was built when he came there; don't know who built the fence. It was a pretty straight fence from Vincennes avenue to Grand Boulevard.

The plaintiff called S. S. Greeley, who testified that he was the

surveyor and made the plat of McKey's Addition and staked every lot; that in staking the lots he staked into what had been opened as a street. Part of that street came into the subdivision; about twenty-three feet of it. The stakes of the lots were set twenty-three feet south of the north line of the street. At the west line of Vincennes avenue the north line of the street as staked by him was twenty-three feet south of the apparent north line of the street; at the east side of Grand Boulevard it was some twenty-three feet; twenty-three feet on Vincennes avenue, and twenty-three and five-hundredths feet on the Grand Boulevard, so that he took for the south tier of lots in block one a strip of land out of what was the apparent street, which was 23.05 feet wide at Grand Boulevard and
23 feet wide at Vincennes avenue and extending along from
51 the Grand Boulevard to Vincennes avenue.

The witness further testified that he staked the south line of the lots and the north line of the street, as laid out on the plat, 23 feet south into what was apparently a street. The stakes were all driven in the grade of the street.

Upon said trial it was admitted that the title to the McKey ten acres, being the south half of the south half of the northwest quarter of the northeast quarter of section 3, 38, 14, was derived from the canal trustees through mesne conveyances.

The plaintiff offered in evidence a certified copy of a certificate of purchase from the canal trustees of the northwest quarter of the northeast quarter of section 3, 38, 14, by P. F. W. Peck, which certificate was never recorded in the recorder's office of Cook county, Illinois, which certificate was as follows:

Copy.

No. 738. *Ordinary Certificate for Land.*

ILLINOIS AND MICHIGAN CANAL OFFICE,
CHICAGO, *May* 10, *A. D.* 1849.

This certifies that P. F. W. Peck has this day purchased of the board of trustees of the Illinois and Michigan canal the N. W. ¼ of the N. E. ¼ of section No. 3, in township No. 38, of range No.
14 east, of the third principal meridian, containing 40 acres,
52 more or less, at the rate of fifteen dollars and — cents per acre, amounting to the sum of six hundred dollars and — cents; that he has paid towards the same the sum of one hundred and fifty dollars and — cents, being one-quarter of said purchase-money, and also twenty-seven dollars and — cents, being one year's interest in advance on the residue of the purchase-money. The said board has also received from said purchaser his three several promissory notes for one hundred and fifty dollars and — cents each, due in one, two, and three years, respectively, for the residue of said purchase-money, said notes bearing interest at six per cent. per annum, payable annually in advance, and upon the full payment

of the said promissory notes and the interest thereon promptly according to their tenor and effect the said purchaser will become entitled to receive from said board a good and sufficient deed of conveyance of said lot; but in case of a failure on the part of said purchaser to pay such interest or the residue of such principal within twenty days after the same or any installment thereof becomes due he shall forfeit said lot and all claims thereto and all payments made on account thereof.

In witness whereof the said board of trustees have caused the corporate seal of said board to be hereto affixed and the name of the treasurer of said board to be hereto subscribed the day and year above written.

[Seal of the Board of Trustees of the Illinois and Michigan Canal.]

D. LEAVITT, *Treasurer.*

53 "Received a deed for the above May 26th, 1853.
P. F. W. PECK."

"CHICAGO, *May 8th*, 1850.

Received the amount of note due May 10, '50, and one year's interest in advance on the two notes not yet due, mentioned within.
GEO. SMITH & CO., *Ag'ts*,
Per C. B. FARWELL."

"CHICAGO, *May 10th*, '51.

Received the amount of note due this day and interest in advance on the remaining note unpaid.
GEO. SMITH & CO., *Ag'ts*,
Per C. B. FARWELL."

"STATE OF ILLINOIS, } ss:
Will County, }

I, George F. Brown, secretary of the board of canal commissioners of the State of Illinois, hereby certify that the above and foregoing is a true and correct copy of certificate No. 728 for land as issued by the board of trustees of the Illinois and Michigan canal and now on file in this office and in my keeping.

Witness my hand and the official seal of the board of canal commissioners of the State of Illinois this tenth (10) day of March, A. D. 1888.

[Seal of the Board of Canal Commissioners, State of Illinois.]

GEO. F. BROWN, *Secretary.*

Canal office, Lockport, Illinois."

54 Plaintiff offered in evidence a duly certified copy of the "land book" of the canal trustees, showing all conveyances by them in the N. E. $\frac{1}{4}$ of said section 3, as hereinafter more fully set out.

Plaintiff also offered in evidence a deed from the trustees of the Illinois and Michigan canal to P. F. W. Peck, dated May 26th, 1853,

and recorded May 27th, 1853, in Book 1 of Canal Deeds, at page 390, in consideration of $600.00, conveying the northwest quarter of the northeast quarter of section 3, township 38, range 14 east, of the 3d principal meridian, containing forty acres, more or less.

Plaintiff also offered a connected chain of title from P. F. W. Peck of the south ten (10) acres of the said northwest quarter of the northeast quarter of section 3, to Michael and Edward McKey.

Plaintiff also offered in evidence a certificate of sale by said canal trustees, dated May 14th, 1852, to Robert S. Wilson and William B. Egan, containing the following description: "North half of the southwest quarter of the northeast quarter of section No. 3, township No. 38, of range No. 14 east, of the 3d principal meridian, containing $19\frac{31}{100}$ acres, more or less, at the rate of $50 per acre, amounting to the sum of $965.50," which certificate was substantially in the same form as the certificate to P. F. W. Peck, above set forth. It is admitted that George S. Bowen held the title to the land last described by mesne conveyances from Wilson and Egan.

The counsel for defendant objected to the introduction of any testimony relating to the purchase and sale of lands out-
55 side of the northwest quarter of the northeast quarter of section 3, in which the lands in dispute are located; which said objection was overruled by the court and the evidence admitted.

Plaintiff also offered in evidence a deed from the Illinois and Michigan canal trustees to Robert S. Wilson, dated April 1st, 1857, conveying the north half of the southwest quarter of the northeast quarter of section 3, township 38 north, range 14, containing $19\frac{31}{100}$ acres, in consideration of $965.00, which deed was recorded November 17th, 1864, in the recorder's office of Cook county, Illinois.

Plaintiff offered in evidence, which was admitted over the objection of the defendant, a certificate of sale from the Illinois and Michigan canal trustees, dated May 14th, 1852, certifying to the purchase by John C. Dodge of the following-described property: "South half of the northwest quarter of the northeast quarter of section No. 3, in township No. 38, in range No. 14 east, of the 3d principal meridian, containing twenty (20) acres, more or less, at the rate of $50 and — cents per acre, amounting to the sum of $1,000," said certificate being in the ordinary form above fully set forth; also a deed from the canal trustees to said Dodge, dated October 6th, 1855, conveying the premises, according to the description in the above certificate of sale, for the consideration of $1,000.

It appeared in evidence from the land book of the canal trustees that last-described land was entered in said book as contain-
56 ing $19\frac{31}{100}$ acres, in ink; that through the ink entry of the figures "$19\frac{31}{100}$" was drawn a pencil line, and over the figures "$19\frac{31}{100}$" the figures "20" were written in pencil.

Plaintiff also offered in evidence canal trustees' certificate of sale to Isaac Cook, dated May 10th, 1849, certifying to the purchase of the "northeast quarter of the northeast quarter of section No. 3, in township No. 38, of range No. 14 east, of the 3d principal meridian, containing forty acres, more or less, at the rate of $15 per acre,

amounting to the sum of $600.00," said certificate being in the ordinary form, as above set forth; also a deed from the canal trustees to Isaac Cook, dated August 16th, 1852, and recorded August 16th, 1852, in Book 1 of Canal Deeds, at page 251, of the Cook county records, for the consideration of $600.00, conveying "the northeast quarter of the northeast quarter of section 3, township 38 north, range 14 east, of the 3d principal meridian, containing 40 acres, more or less."

Plaintiff also offered in evidence canal trustees' certificate of sale, dated September 2, 1852, to William B. Egan, certifying to the purchase of "the north half of the southeast quarter of the northeast quarter of section No. 3, in township No. 38, range No. 14 east, of the 3d principal meridian, containing $19\frac{31}{100}$ acres, more or less, at the rate of $60 per acre, amounting to the sum of $1,158.00," which certificate is in the ordinary form.

Also a deed from the canal trustees to William B. Egan, dated January 28th, 1856, and recorded in the recorder's office of
57 Cook county March 3, 1856, in Book 2 of Canal Deeds, page 316; in consideration of $1,158.00 conveys the "north half of the southeast quarter of the northeast quarter of section 3, township 38 north, range 14 east, of the 3d principal meridian, containing $19\frac{31}{100}$ acres, more or less."

Also a certificate of sale issued by the Illinois and Michigan Canal trustees to Joseph Johnson, dated May 14, 1852, certifying to the purchase of the "south half of the southeast quarter of the northeast quarter of section 3, township 38, range 14 east, of the 3d principal meridian, containing $19\frac{31}{100}$ acres, more or less, at the rate of $50 per acre, amounting to the sum of $965.50.

Also a canal trustees' deed to Margaret Johnson, to whom the above certificate has been assigned, dated July 1st, 1859, and recorded July 5th, 1859, in Book 3 of Canal Deeds, at page 266, in consideration of $965.00, conveying the "south half of the southeast quarter of the northeast quarter of section 3, township 38 north, range 14 east, of the 3d principal meridian, containing $19\frac{31}{100}$ acres."

It is admitted that none of the above canal trustees' certificates of sale were ever filed for record in the recorder's office of Cook county, in which said lands were situated.

It was admitted that the canal trustees held title to the whole of the northeast quarter of said section 3, and that the above deeds placed all the title to said quarter section from the canal trustees to the grantees aforesaid, and that the said canal trustees derived title directly by grant from the United States to the State of Illinois, and by grant from the State of Illinois to the trustees of the Illinois and Michigan canal.

58 The witness Greeley then further testified that he had minutes of the six conveyances of said quarter section, covering the whole of the quarter section, by the certificates and conveyances above mentioned.

The plaintiff also put in evidence a certified copy of the original plat of the United States survey, so far as it related to sections 2 and

3, in township 38 north, range 14 east, of the 3d principal meridian, which said plat is as follows:

(Here follows diagram marked p. 58½.)

59 AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *March* 5, 1888.

I, Charles P. Swigert, auditor of public accounts of the State of Illinois, do hereby certify that the foregoing and annexed instrument is a true, full, and correct copy of the original plat of United States surveys, so far as it relates to sections 2 & 3, T. 38 N., R. 14 E., 3d P. M., as shown in volume 30, page 23, Illinois Plats.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, the day and year first above written.

Auditor's Office, Illinois.

(Signed) CHAS. P. SWIGERT,
[SEAL.] *Auditor of P. A.*

60 Witness Greeley, with the plat of McKey's Addition in hand, explained and stated the manner in which he surveyed the premises and made the plat for McKey's Addition, as shown above. He then stated that when he made the survey of McKey's Addition he was informed of how the canal trustees had conveyed the northeast quarter of section 3; that he had the minutes of the six conveyances in that quarter section, covering the whole quarter; that before making the survey he went to the United States plat of section 3, which showed that the northeast quarter was a fractional quarter section—not full 160 acres, but $157\frac{23}{100}$ acres; that before making the survey it was necessary to know the canal trustees had conveyed the land; that the portion in which Mr. McKey's land lay was described as the northwest quarter of the northeast quarter of section 3, containing 40 acres, more or less. Witness said that he "found, however, that in looking over"——

Counsel for defendant objected to witness stating what he found in regard to the conveyances, which were matters of record.

The COURT: You take the position that they have no right to go beyond these deeds introduced in evidence here?

Mr. MANN: I do.

The COURT: For the present I will let them go on.

Witness Greeley then stated: "I do what we almost always do in surveying, see how the adjacent land is conveyed, to see if there is any ambiguity in the title. I found then there were six conveyances by the canal trustees to six different parties in the north-
61 west quarter of section 3; two of the pieces were conveyed as the northwest quarter of the northeast quarter and the northeast quarter of the northeast quarter, each being 40 acres, more or less; then there were four conveyances—one conveying the north half of the southwest quarter of the northeast quarter of section 3, containing $19\frac{31}{100}$ acres, more or less; one the south half of the

southwest quarter of the northeast quarter, containing $19\frac{31}{100}$ acres, and one the north half of the southeast quarter of the northeast quarter, containing $19\frac{31}{100}$ acres, and one the south half of the southeast quarter of the northeast quarter, containing $19\frac{31}{100}$ acres. The south half of the southwest quarter of the northeast quarter was marked in two ways; it was marked $19\frac{31}{100}$ acres with a pencil mark through it."

Mr. MANN, counsel for defendant: Are you speaking from personal knowledge in regard to these matters now?

A. I get this from Handy and Company.

Mr. MANN: Such testimony is no good.

Mr. MCKEY: He is merely giving the theory upon which he made his survey.

Witness GREELEY: "I then found that the line between what is technically called the north half and the south half of the northwest quarter was not really the middle line of the quarter section, but was a line far enough south of that to give the proportion of 80 acres in the north half and $77\frac{23}{100}$ acres in the south half. I then divided it upon that basis, giving the north half $\frac{80}{157}$ of the width north and south, and giving the south half 77 and a fractional $\frac{1}{157}$ of the width north and south; that made the north part of the quarter section 1,334 feet long on the west line, and the south
62 part $1,288\frac{2}{10}$ feet, and the true dividing line between the northwest quarter and the southwest quarter of the quarter section, which is properly the south line of the McKey property, the center of 41st street, is a line run east and west through the quarter-section on this basis."

The COURT: Let me see if I understand you. The section was short how much?

WITNESS: It was short $2\frac{77}{100}$ acres.

Q. And in dividing you threw that shortage in the south half of the section?

A. I put it just where the canal trustees seem to have done in their deeds. In point of fact, there was so much surplus over the Government measure that the northwest quarter and the northeast quarter of the quarter section added together make a fraction over 81 acres, instead of 80 acres; and the four pieces in the south part of the quarter section, instead of being $77\frac{23}{100}$ acres, make about 78 acres and a fraction, according to my survey; so that all the parties got more land than the Government actually conveyed—that is, the east and west lines overrun largely, and it is on account of the extra amount east and west that there is more acreage.

Witness stated that he proceeded on the theory that the canal trustees had conveyed 80 acres in the north part of the quarter section, and four times $19\frac{31}{100}$ acres, or $77\frac{23}{100}$ acres, in the south part of the quarter section, and that if there had been exactly $157\frac{23}{100}$ acres in
the quarter section, as was originally shown by the Govern-
63 ment plat, the north half would have been entitled to its full 80 acres, and the south half would have to stand the shortage and receive nearly $77\frac{23}{100}$ acres; that as there was a surplus in the quarter section east and west the north 80 was entitled to its full

share of the surplus, and the south $77\frac{23}{100}$ was entitled to its share of the surplus; in other words, he divided up the actual acreage in the quarter section which was found to be in excess of the 160 acres by giving the north half of the section $\frac{80}{157}$ of the actual acreage, which would make something over 81 acres; and by giving to the south half 77 and a fractional $\frac{1}{157}$ of the actual acreage, which would make in the south half 78 and a fraction acreage, and that he had put the dividing line between the north half and the south half of the quarter section on a line so as to throw this proportionate acreage respectively into the north and south half of the quarter section.

These dividing lines between the north and south half of the quarter section witness stated he placed about three acres south geographically of the center line of the quarter section.

Witness on cross-examination testified that in surveying this northwest quarter of the northeast quarter, containing, as it is stated, forty acres, more or less, he started at the northwest corner of the forty and went south on the west line of the forty a distance of $1,334\frac{3}{100}$ feet to the southwest corner. The entire distance from the north line of the quarter section to the south line of the quarter section is $2,622\frac{5}{100}$ feet. If it was a full quarter section, the
64 whole distance would be 2,640 feet; so that the actual north and south lines are short some $17\frac{1}{2}$ feet.

Witness testified that in surveying this north forty he went south of the point where the forty acres would go to, and took a portion of the property south of that 1,320 feet from the north line of the quarter section. Witness testified that he did this on the theory of making a proportional division of the quarter section into six tracts, in proportion to the number of acres which the canal trustees had deeded in their respective deeds—that is to say, as witness testified, the two tracts together in the southwest quarter of the quarter section he took as containing $38\frac{62}{100}$ acres, and the northwest quarter of the quarter section as containing 40 acres, and he divided the land in that proportion; that the theory he proceeded on was to take $80.157\frac{23}{100}$ of the land for the north half of the quarter irrespective of whether it was a quarter or not.

Witness testified that according to his theory he placed a trifle more land in the northwest quarter of the quarter section than in the northeast quarter, although the deeds called for the same amount of land—40 acres, more or less—in each quarter. This happened because the west boundary line of the quarter section was longer than the east boundary line, and in determining the boundary line between the two forties he had run a line north and south half way between the west and east boundary lines, instead of dividing the acreage in exactly equal proportions.

Witness further testified that in making his survey he did not consider the fact that the canal trustees, in making
65 the deed of the south half of the southwest quarter, conveyed it as 20 acres, more or less, but that he had taken this tract as $19\frac{31}{100}$ acres, that he took this $19\frac{31}{100}$ acres as being analogous to the rest of the deeds; that he had not seen the deed him-

self; that if he had taken that tract as 20 and not $19\frac{31}{100}$ acres it would have thrown the south line of the McKey tract a little further north, and in that event his line was too far south. If the shortage in one of the tracts is taken away it alters the proportion. He would then divide in the proportion of 80 acres to 78 acres and a fraction instead of 80 acres and 77 acres and a fraction.

Witness further testified that according to his survey he put 81 and $\frac{8}{10}$ acres in the north half of the quarter section and $78\frac{96}{100}$ acres in the south half of the quarter section. Witness testified that if he had surveyed, making the south line of the quarter half way between the north and south lines of the quarter section, he would have laid out the street as it is now laid out by the village authorities, and that if he had measured the distance and divided the quarter section without regard to acreage the south line of the McKey tract would have come 23 feet further north than he had actually put it.

Witness further testified that he had his attention called to the instructions of the Government in regard to surveying a quarter of a quarter, and that he followed them. Whether the Government instruction was a correct rule or not made no difference; it is what the Government says, and they have to do it, whether it is correct or not. Witness did not know that any change had been
66 made in the instructions of the Commissioner to surveyors general of the United States in reference to the survey of public lands, which book was dated in 1881. "It would make no difference in my method of surveying if the Government's directions said in ascertaining a quarter of a quarter I should divide the lines equidistant from the corner points. The Government does not undertake to say to a private owner how he shall divide his land."

Witness testified further that if the deed was brought to him conveying the northwest quarter of the quarter section, no other instructions being given, he would survey it by dividing the land equally; would measure the distance, put his point half way here, the same there, and run across. If the grantees told witness to survey differently he should survey according to his instructions, leaving the responsibility with them, but showing on the plat that he had surveyed it against his judgment; but he would not survey differently and certify that he had surveyed the northwest quarter of the quarter. The instruction of the Government, which is correct, is that "in the subdivision of quarter sections quarter quarter corners are to be placed at points equidistant between the section and the quarter section corners and between the corners and the common center of the section."

Q. If this had been a deed directly from the Government conveying the northwest quarter of the northeast quarter of section 3, containing 40 acres, more or less, you would have surveyed that by dividing the lines equidistant?

A. Not necessarily. I should then look to see how they had conveyed the south half.

67 Q. Supposing they had not conveyed the south half, isn't

it possible to survey the northwest quarter of the northeast quarter before the rest of the quarters have been surveyed?

A. Yes; undoubtedly.

Q. Supposing, then, this deed had been brought to you to survey the northwest quarter of the northeast quarter, containing 40 acres, more or less, before the canal trustees had conveyed any other portion of the quarter section, where would you have located the lines?

A. I should have put it midway between the north line and the south line, undoubtedly.

Witness testified that if he had so located the line midway at that time, and afterwards they had conveyed the other portions of the quarter section, he would not go and relocate his lines; that he did not remember that in making his examination of the canal trustees' conveyances that his attention was called to the fact that the deed conveying the northwest quarter of the northeast quarter section was made some three years before the deeds conveying the two portions of the southwest quarter of the quarter section, but that fact would not have made any difference in his survey.

Q. Your theory is, then, that at the time the deed was made the conveyance did not show how much property was conveyed, and that you could not have made a true survey at the time this first deed was made.

A. I do not know why not.

Q. You could not, under your statement, have made a true survey according to your theory, because the deeds conveying
68 these two pieces in the southwest quarter were not made for three years afterwards.

A. I do not know anything about that.

Q. Would that fact make any difference in your surveying at the present date?

A. No, sir.

Q. Do you think that when a deed is made you must be able to locate the property by the deed without waiting for three years to see what the grantor is going to do?

A. I suppose very likely. Yes; I think so.

Q. Do you think you could have located the northwest quarter of the northeast quarter, containing 40 acres, more or less, before the canal trustees, three years afterwards, made these two deeds of the southwest quarter of the quarter section?

A. Yes, sir.

Q. And you would have located it by taking points equidistant from the quarter corners?

A. Without any other information; yes, sir.

The COURT: Supposing you had been called on to make a survey and this northwest quarter and also the northeast quarter of this quarter section had been sold, but the canal trustees owned the south half, did I understand you to say that in that case you would have run this line equidistant between these two points?

A. Yes; if I had a Government full quarter section, but in this case the quarter section has only $157\frac{23}{100}$ acres, and I should be in doubt about the survey. If a man should sell off the north 80 acres

and there would be 77 acres left I should not put the line in the center in that case.

69 Q. Would you change that line simply because subsequently the canal trustees conveyed land south of that line?

A. I fixed that line in view of the six conveyances.

Q. In view of the manner they subsequently described the line south of this land?

A. In view of the way in which it was conveyed at the time I made the subdivision.

And the witness further testified that if there was a conveyance from the Government conveying simply the northwest quarter of the northeast quarter of the section he would be in doubt as to how the survey should be made for the reason, as stated, that the Government very often sells a full eighty and then sells the balance in separate tracts; and, further, that the Government instructions say, in regard to surveying where there is a short quarter section, "except on the last half mile of the lands closing on the north or west boundary of a township, where quarter corners shall be placed at 20 chains, proportionate measurement, to the north and west of the quarter section;" and that the quarter section in controversy was in the north half mile of the north section of a township, and that if witness had followed the Government instructions in order to establish the south line of the quarter section he would have commenced at the south line of the quarter section and run north 20 chains; that in the opinion of the witness it makes no difference whether the Government or the canal trustees made this conveyance, and that the same rule follows, whether the conveyance was made by the canal trustees or by the Government, if they do not

70 mention area. "If this was 40 acres I should have laid off 40 acres. That would have shown that the Government was not following its usual course."

It is admitted by counsel for the respective parties that the canal trustees were the common source of title.

Witness further testified that he had made surveys in the northwest quarter of this quarter section, and that he had surveyed the property immediately south of the McKey ten acres, which is in dispute, and that he had located the fence along the north line of said property and the south line of 41st street as laid out by the village; that he had located this fence running east and west an equal distance between the north and south boundary lines of the quarter section, but that he had done this simply by retracing the subdivision which had been made before, and that he made the north line of the southwest quarter of the quarter section at the midway point, because he discovered that it was the way it had been made before. "I followed the old beat according to my instructions by Mr. Seaverns."

Q. The subdivision which you state you retraced at the north part of the southwest quarter of the quarter section dedicated the north 33 feet for a street, did it not?

A. Yes, sir.

Q. Notwithstanding that you went into that 33 feet in order to locate a fence—went 23 feet into that 33 feet to locate a fence?

A. I located it exactly as it was originally subdivided. I did not make the original subdivision of it.

71 Q. The north 33 feet was dedicated by the plat you had for a street?

A. Yes, sir.

Q. The north 33 feet, then, was in the street; but in locating the fence did you go 33 feet south of the north line of the tract?

A. Yes, sir.

Q. You located the fence where it is now established, did you?

A. Yes, sir.

Q. You say it is 23 feet too far north?

A. I guess it is. Probably what I did say was that the north line of 41st street, as the town had it, was 23 feet further north than I placed it in the McKey subdivision. My recollection is that this other subdivision put the center of 41st street midway between 39th and 41st streets, which are the north and south boundary lines of the quarter section; but I followed the old plat, of course.

Q. You knew following the old plat would make these two subdivisions overlap about 23 feet?

A. Yes; clearly.

Q. Did you call their attention to the fact?

A. I do not remember whether I did or not. It is a great many years ago.

Q. And you still located the fence there?

A. Yes, sir; I put it exactly on the old line of the original subdivision of Bowen's tract.

On redirect examination witness testified that he did not make Bowen's subdivision—simply ascertained the lines as previously made by another surveyor. It was not his duty as surveyor to change the subdivision. He gave them the fence line just as

72 he saw it had been previously surveyed and laid out by another surveyor—restaked the lot that had been staked before by somebody else.

Bowen's subdivision was staked 23 feet north of what he claims would be the proper line of McKey's subdivision. They directed him to restake the lots in Bowen's subdivision according to the original subdivision, which he did. He changed nothing whatever. He was directed by Mr. Seaverns to restake the land in Bowen's subdivision—found where they had originally been and restaked them. Seaverns put his fence there, as witness supposed, upon his stakes.

If a survey had been made several years ago by somebody else and located wrong and witness to-day, as surveyor, were called upon to resurvey and find the stakes and how it was originally laid out—would not have anything to do with the erroneous location of them, but would retrace the original survey—would follow the old plat, whether there were mistakes or not.

Supposing the theory of the defense to be correct, still all the property claimed in this suit, to wit, all of lot 11 and part of block

10, would be still north of the south line of the McKey ten acres. The south line of lot 11 would be ten feet north of the south line of the original McKey ten acres.

All these conveyances by the canal trustees were made some thirty years before his subdivision of the McKey ten acres. He has been actively engaged in the profession of a surveyor for nearly forty years.

73 Gustav H. Carlson was called as a witness for plaintiff, and it was admitted that he would testify to the same theory as Mr. Greeley. He stated that he had been a surveyor for sixteen or eighteen years, and that he would make a survey upon the same theory as Mr. Greeley; that he had heard the cross-examination of Mr. Greeley; that he had been in the same business and connected with Mr. Greeley in business; that he heard his testimony in regard to the survey.

Henry McKey, a witness called by the plaintiff, testified that Michael F. McKey, one of the grantees in the deed from Cleaver and wife, introduced in evidence, died intestate in Janesville, Wisconsin, on the 19th day of September, 1868. He left no widow or descendants of deceased children, but left him surviving, as his only heirs-at-law, William D. McKey, the plaintiff in this case, who became of age in September, 1874; Thomas F. McKey, who became of age in September, 1877; George M. McKey, who became of age in February, 1879, and Harriet McKey (now Harriet McKey Smith), who became of age by the laws of Illinois in 1879, being eighteen years of age then. Edward McKey, the other grantee in the deed from Cleaver, died intestate on the 14th day of August, 1875. He left surviving his widow, Harriet McKey, and eight children. Two of these children have since died—Maud, who died on the 25th day of May, 1878, seven years of age, and John M., who died on the 7th day of June, 1881. He came of age on the 14th day of August, 1879. He was between twenty-two and twenty-three at the time

74 he died. He died intestate. He never was married. The surviving children of Edward McKey who are now living are Mary M. Stevens, who was of age when her father died; Henry McKey, that is myself; I was of age when my father died; Gertrude H. Barbour, who was of age when her father died; Edward B. McKey, who was of age when his father died, being twenty-three years old; Harriet M. Tuthill, who was not of age by the laws of Wisconsin, where she lived, but was of age by the laws of Illinois when her father died; she was nineteen years of age when her father died; and Richard M. McKey, who will be of age on the sixth day of next August (1889); he is not of age yet. Edward McKey left no heirs but those named and no descendants of deceased children.

He further testified that Michael F. McKey and Edward McKey, grantees in the deed from Cleaver, and all of their descendants, except the witness, lived in Janesville, Wisconsin; that the plaintiff in this suit had always lived there until within the last two or three months, when he removed to Hyde Park.

And the said plaintiff having put in evidence the original decree

of the circuit court of Cook county, in chancery, ordering a partition and appointing commissioners, by which it appeared that all of the parties above named interested in said lands conveyed by Cleaver and wife to Michael F. and Edward McKey were properly brought before the court, and also having offered in evidence the final decree of October 6th, 1882, in the same cause, wherein the report of the commissioners in partition was confirmed, and there was allotted and assigned in severalty, in fee simple, to the plaintiff
75 in this cause, among other properties, lots 10 and 11, in said McKey's Addition to Hyde Park, which embraces all the premises in question in this suit, and there being no contention as to his title thereto in fee simple, the plaintiff thereupon rested his cause.

The defendant, to maintain the issues on its part, introduced the following testimony:

Christopher McLennan testified that he had been a surveyor and civil engineer in active service for about thirty years; that he was familiar with the location of the property in question and had surveyed that property and other property in the neighborhood; that he was familiar with the acreage given by the Government and with the actual acreage of the northeast quarter of section 3, in question, and also with the correct location of the south line of the northwest quarter of this northeast quarter; that, in his opinion, in order to correctly locate this south line of the northwest quarter of the quarter section, the quarter section should be divided into four equal quarters by lines drawn midway between the extreme boundaries. "In my opinion, Mr. Greeley's survey, by which he extends the west line of the northwest quarter of the quarter $1{,}334\frac{3}{10}$ feet south of the north line, is not the correct division of the property." Witness testified that in order to locate that northwest quarter of the northeast quarter of the quarter section containing 40
76 acres, more or less, he would run a line midway east and west between the north and south lines of the quarter section. If he went to any other place he would be coming into the southwest quarter; that the term "the northwest quarter of the northeast quarter" had a very well-recognized meaning in the surveying profession, and that meaning is that a quarter of a section is one-quarter of it by drawing lines midway between the extreme boundaries of the quarter section, and that such was the practice followed in the engineering profession; that in the opinion of the witness in surveying a tract of land that is described by a Government description the description of the land controls in preference to the quantity of acreage stated in the conveyance. Witness stated that one reason for this is that where the Government intends that this quarter of the quarter should not be quite in the center they always gave the south half of it 20 chains, or 1,320 feet, a full forty, and threw the balance into the north end and designated it as lots one and two—that is, the Government in making surveys where a fractional quarter section was found on the north or western tiers of sections in a township and it was desired to sell the quarter sections out other-

wise than as quarters of a quarter, it was sold in lots making the south lot take 20 chains of it and throwing the balance or shortage into the northern portion.

Witness further testified that if this northeast quarter of section 3 be subdivided into four quarters by dividing the quarter section by equally distant lines, such a survey would locate 41st street in exactly the position where it is now occupied by the village,
77 and in that case the true line between the northwest quarter and the southwest quarter of this northeast quarter of the quarter section would be in the center of 41st street as now laid out and occupied, and the south 33 feet of the McKey tract would be in what is now 41st street, but only the south 33 feet would be in that tract.

Witness further testified that as a matter of fact there were over 160 acres in the northeast quarter of section 3, and that while the north and south lines of the quarter section were short, so as to make a slight shortage in the acreage, the east and west lines were long, and more than made up the north and south shortage, and that if the quarter section were divided into quarter quarters by running lines midway between the extreme boundaries it would make four quarter quarters, each containing something over 40 acres.

Witness further testified that 41st street was opened along the south line of the McKey tract, about 1873, by the village of Hyde Park, and that the street as opened took 33 feet off the south portion of the McKey ten acres, and that 41st street was opened east and west from this point in both directions on the same line as here.

Witness further testified that in his opinion the description on the canal trustees' deed of "40 acres more or less" would not control the legal description of the quarter quarter, and would have no effect whatever on his survey; that he would put the line in precisely the same place whether the deed said more or less or not, as long as it said northwest quarter; in other words, he would not
78 think of going outside of the northwest quarter of the northeast quarter to locate the land, and that the moment he went south of the line midway he would be going into the southwest quarter of the quarter; that he went on the theory that the deed conveyed one-quarter of the quarter section; that the description "40 acres, more or less," was a common description of a quarter quarter, and was frequently used, whether a quarter section actually contained more or less than 160 acres or not.

It is admitted by counsel that the Government rule is that where there is a shortage or surplus in the township the shortage of surplus is thrown into the northern and western tiers of quarter quarter sections of the township.

Counsel for the plaintiff objected to proving the opening of 41st street by parole; which objection was overruled and exception taken.

On cross-examination witness testified that when he lays out a subdivision he generally stakes the land; such stakes control under certain circumstances. They control if they are right; if not right,

would not control witness. As he understands it, the original Government stakes must control, whether right or wrong.

Supposing that a man owned the east half of a quarter section, and that east half contained but 77 acres, and the owner makes two deeds, one to A, in this language: "In consideration of $4,000, or $100 an acre, I convey the north half of the east half of the quarter section for $4,000;" the other deed in this language: "In
79 consideration of $3,700, or $100 an acre, I convey the south half of the east half of the quarter section," and the witness is given the two deeds and asked to draw a line between the two grantees, he would draw it in the center, thus giving to each man 38½ acres.

On redirect examination witness further testified that ever since 41st street was opened through this property where the street is now located, in 1873, the village had been in possession, using it as a street; that an ordinance was drawn for the construction of a sewer, and that a sewer was built on the settled line of the street in 1877; that the street was opened to the public and used as a street; that the street had now been paved for several years, with curbing along the side of the pavement on each side, and grass plats; that the sidewalks had been constructed along the south side of the street about 1880; that on the north side of the street along the McKey ten acres, which had been subdivided into McKey's Addition to Hyde Park, sidewalks had been built and twelve or fifteen houses had been built, fronting south on 41st street, by purchasers of this McKey property; that the improvements which are made there, on the north side of 41st street, have been made with reference to this 41st street, as now laid out and possessed by the village—that is, they conform to the position of the street, as homes are usually built with reference to any street and sidewalk in front of the houses—that is, in the right position with reference to the street line.

Counsel for the plaintiff objected to this testimony unless the McKey heirs were connected with these improvements. The
80 objection overruled and exception duly entered.

Witness further stated that if two men owning adjoining tracts had a dispute on their boundary and one had his tract surveyed and staked, and the other recognized the stakes as the proper line, although, in fact, it was not the proper line, and the other acquiesced in it, the stakes would be the line, but if a surveyor was called upon to give the proper line between the two parties he might differ from them.

Q. In order to find the proper line you want knowledge of other things beside the actual Government survey, don't you?

A. We want their deed. That is common sense. You must have the deed.

F. C. ROSSITER, a witness for the defendant, testified as follows:

That he had been a surveyor and engineer for twenty-one years, and that he was acquainted with the property in dispute; that he

has made surveys there; that for the purpose of finding the south line of the northwest quarter of the northeast quarter of section 3, T. 38 N., R. 14, containing forty acres, more or less, he would place the south line of the quarter half way between the north and south lines of the quarter section, and would do that irrespective of the acreage in the quarter section; that according to this survey the south line of this northwest quarter of the quarter was the
81 center line of 41st street as occupied by the village; so that the north 33 feet of 41st street, as occupied, would be the south 33 feet of the McKey ten acres.

On cross-examination witness stated that he had discovered that the McKey Addition as actually staked ran about 23 feet south into 41st street. Any surveyor could have gone after McKey's Addition was laid out and staked and found it did occupy a part of what is now called 41st street.

William Lee, a witness for the defendant, testified that he had been a civil engineer for twelve or thirteen years, and had been employed as Government surveyor for about three years; that he was familiar with the property in question; that in his opinion the correct method of finding the true southern line of the northwest quarter of the northeast quarter of section 3 was by the method described by Mr. McLennan—that is, by taking one-half of the distance; that the center line of 41st street, as located now, is half way between 39th and 43d streets, so that he would make the south line of McKey's Addition the center line of 41st street as it now stands—that is, the center line of 41st street is the southern line of the northwest quarter of the northeast quarter; that he has surveyed the west line of the quarter section and found the distance from the center of 43d street to the center of 39th street to be $2,624\frac{5}{10}$ feet, and that 39th and 43d streets are, respectively, the north and south lines of the quarter section; that, according to the witness'
82 survey, the distance from the north line of the quarter section to the south line of what was the McKey tract, or the south line of the quarter of the quarter, would be just one-half of the above distance, $2,624\frac{5}{10}$ feet, or $1,312\frac{25}{100}$ feet.

Witness further testified that he had made a recent survey of 41st street, and that the houses located in the McKey Addition, on the lots fronting south on 41st street, were located with reference to the street as it is now actually laid out; that there were nine houses between Vincennes avenue and Grand Boulevard fronting south on 41st street and seven or eight houses in the McKey tract east of Vincennes avenue and fronting south on 41st street; that there was a house located on the northeast corner of 41st street and Vincennes avenue, fronting west on Vincennes avenue with the side on 41st street, located some three or four feet north of the north line of 41st street as now laid out, with the sidewalk immediately south of it; and also a fence marked the line between the lot and the street.
83 On cross-examination witness stated that he did not know who built the houses on the north side of 41st street between

Grand Boulevard and Vincennes avenue nor when they were built.

It is admitted that these houses have been built since 1882, the time of the partition, and that none of them were built by the McKey heirs, but were built by purchasers from the McKey estate.

Jacob T. Foster, a witness for the defendant, testified that he was a surveyor and civil engineer, and was the county surveyor of Cook county, in Illinois; that he was not very particularly acquainted with the location of the premises in question; that if he were called upon to survey the northwest quarter of the northeast quarter, containing 40 acres, more or less, he would ascertain the southern line of the quarter of the quarter by measuring the west line of the quarter section and dividing it in the middle, then measuring the east line of the quarter section and dividing it in the middle, and run a line through from one point to the other, so that if the west line of the quarter section was 2,622½ feet long he would make the west line of the quarter quarter one half of that, and make the south line of the quarter quarter that many feet south of the north line. That is the correct principle in surveying.

84 Cross-examination of witness by Mr. McKEY:

Suppose, Colonel, that the canal trustees owned the northeast quarter of section 3, the whole of it; that it contained by Government survey 157 and $\frac{23}{100}$ acres; they deed the northeast quarter of the quarter, stating in their deed forty acres, more or less, taking pay for the same at $15.00 per acre, or $600.00. They afterwards convey the northwest quarter of the quarter section, describing it in their deed as containing forty acres, more or less, and selling it for $15.00 per acre, or $600.00. After this conveyance the canal trustees convey the north half of the southeast quarter of the quarter section, stating in their deed it contains $19\frac{31}{100}$ acres, more or less, for $15.00 per acre, or $289.65, and do the same with other parts—the north half of the southwest quarter of the quarter section and the south half of the southeast quarter of the quarter section. They then sell the south half of the southwest quarter of the northeast quarter of the section and take pay for twenty acres at $50.00 per acre, and you know all about those deeds as made by the canal trustees, and then you are asked to make a survey dividing the north half of the quarter section from the south half, how would you do it, then, so as to proportion the land among the buyers? How would you place the line east and west for the division between the north part and the south part? Did you hear Mr. Greeley's testimony, and did you understand his theory in surveying here?

A. I think so; I think Mr. Greeley did as he did as a matter of equity and not as as a matter of what he should do by the
85 deed. My theory would be to give the northwest quarter in accordance with the description of the deed—I do not know how a surveyor can do anything else—and I should make a survey with a line running midway; one side would be the north half and

the other must be the south half. I should go by the description rather than by the acreage.

Counsel for defendant offered in evidence a certified copy of a deed of dedication from Edward McKey, conveying the south 33 feet of the McKey tract to the village of Hyde Park, which was objected to by the plaintiff, which objection was overruled, and said deed admitted in evidence subject to the plaintiff's objection, to which ruling the plaintiff's counsel then and there excepted. Said deed is as follows:

"This indenture witnesseth that the grantors, George S. Bowen, E. McKey, Henry Rieke, John D. Parker, of the county of Cook, and State of Illinois, for the consideration of one dollar, convey and quitclaim to the village of Hyde Park, in the county of Cook and State of Illinois, for the purpose of a public street or highway, all our interest in the following dscribed real estate, to wit:

The north thirty-three (33) feet of lots, twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), in Dobbin's subdivision of the north half of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of section three (3), township thirty-eight (38) north, range fourteen (14) east of the third principal meridian; also, the north thirty-three feet (33) of the southwest quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of said section three (3).

86 Also, the south thirty-three (33) feet of that portion of the northwest quarter ($\frac{1}{4}$) of the northeast quarter of said section three (3) lying west of Vincennes avenue, situated in the county of Cook, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State.

Dated this fourth day of November, A. D. 1872.

GEORGE S. BOWEN. [SEAL.]
EDW'D McKEY. [SEAL.]
HENRY RIEKE. [SEAL.]
JOHN D. PARKER. [SEAL.]"

Which deed was duly filed for record in the recorder's office of Cook county March 5th, 1873.

It was admitted that P. F. W. Peck and Robert S. Wilson, grantees of the canal trustees above mentioned, were both dead.

HENRY MCKEY, a witness called on behalf of the defendant, testified as follows:

That he was the witness who had been previously examined for the plaintiff; that he was here in Chicago in 1873; that his father, Edward McKee, was then living; that his father died in August, 1875; that at the time of his father's death his father owned an undivided half interest in the McKey tract; that the witness had visited the premises in question several times with his father during the later years of his life.

87 The counsel for the plaintiff objected to all testimony tending to show by the declaration or acts of the said Edward Mc-

Key anything like a common-law dedication, for the reason, as stated, that Michael F. McKey, the ancestor of the plaintiff, died in 1868, five years before the street was claimed by the town, and because the plaintiff was a minor and had not become a resident of Chicago until 1888; which objection was overruled by the court; to which ruling counsel for the plaintiff then and there duly excepted.

Witness further testified that in 1873 he understood that the street was to be run through his property; that he was there at the time and saw them tearing down the fence, which had been proven to exist, and taking possession of the property, as he supposed, for a street; that he then noticed that the center of the street was put considerably north of that fence; that the street was then located where it now runs. They took possession of the land for a street. They did not lay out the exact lines. Witness never saw it staked out, but what appeared to be the center of the street was very much north of the fence. Witness supposed it was intended to be a 66-foot street, and had no doubt that part of the land in controversy in this case was included within the street at that time. Witness was satisfied that the street as then laid out coincided with the street as now laid out, but did not feel competent to swear to it exactly.

Witness made no objection to the opening of the street in that way at that time or for a number of years afterwards.

88 In regard to the payment of taxes on this property for a number of years, both before and after the date of 1873, witness did not furnish the money for the payment of the taxes, but acted as the fiscal agent who took the money. He handled the money and gave it or a check to the tax office.

The COURT: You know what the question means. Did you pay that money to the person who received it?

A. I have paid the taxes a great many times as agent of that property from 1873 until and including 1887.

Witness further testified that when he saw this street opened he supposed it was all right; that it was opened on the right line, and that the fence was wrong. He knew nothing about it at all, but noticed that they did not follow the fence as the center of the street. Witness supposed that it was a mistake and that the land had not been fenced right, but never said anything about it, and never discovered the actual condition of things until, in conducting this partition suit, when Mr. Greeley, the surveyor, told him of this error. They supposed that the land was divided as shown by the plat of the McKey Addition.

Witness further testified that lots in the McKey Addition were sold and the deeds were made to the parties by describing the lot and containing the condition that the warranty deed would not extend to any portion of the lot claimed by the village of Hyde Park as a street, and that these purchasers have gone on and built their fences on the present line of the street.

89 On cross-examination witness testified that in his opinion no act had been done by any one of the McKey heirs to recognize the street as claimed by the village of Hyde Park since

the date of the final decree and partition, October 6th, 1882; that since this land was partitioned witness had had the entire management of it, all the parties except two being non-resident; that he had constantly brought up this question before the trustees of the village of Hyde Park, had filed a petition, and had interviews with them a great many times; that a few of these lots between Vincennes avenue and Grand Boulevard, probably a dozen or more, were conveyed by the different parties holding the lots after partition. Parties would come to witness, through an agent, and want to buy these lots, but that they held back and did not desire to sell them on account of this question of street; but people would offer to buy them and run the risk of the street.

Witness stated that when deeds were made the deeds of conveyance contained a condition that the warranty of title did not extend to any portion of the lot claimed as a street.

Counsel for the plaintiff offered to show what was said by purchasers with reference to these lots and the street when they were negotiating for their lots; which was objected to. Objection sustained and exception by plaintiff's counsel.

Witness further testified that after the tearing down of the fence, in 1873, the land remained opened, just as it was left by the village authorities, until one John English took it and put some sort of an irregular wire inclosure along the south side. Witness could
90 not now state whether he followed the line of the street or not. The posts he remembered seeing were simply pieces of oak trees. This was in 1880. There were small oak trees over a part of this land and he made fence posts of them, which only remained there until the partition. The fence was along the north side of the street. Whether he followed the line of the street or not witness did not know. He never noticed particularly. He knew that English fenced it in. He knew that English regarded the street as opened. He did not intend to fence the street in unless it might be a few feet on the north side of it, and when the land was partitioned, in 1882, he left. English was there during all the partition proceedings and rented on a small rent.

Witness testified that during all the time after the opening up of the street until the fall of 1888 Mr. William D. McKey, the plaintiff in this suit, was a resident of the State of Wisconsin. He came of age September, 1874, after the opening of the street and the tearing down of the fence. Witness has no recollection of Edward McKey being upon the land after 1872.

In 1872 Edward McKey was in Chicago a good deal. His health was bad, and had been for a good many years, during the summer. He lost a building in the big fire and was rebuilding in 1872, but his health was pretty bad. After that was finished he seldom came to Chicago. He used to run down here in 1872, after the big fire, and ask witness to go with him to the different lands he was interested in. That was the way witness happened to be down there. After his building was finished he seldom came to Chicago to stay

more than a day; have no recollection of his being there after 1873.

91 Witness further testified that 41st street was occupied by the village when the partition proceedings were commenced, but at that time witness thought it was all right. The village of Hyde Park was not made a party to these proceedings.

Witness knew about the deed of dedication from Edward McKey to the village of Hyde Park, but did not know as he ever had anything to do with it himself, although he knew there was such a deed given. At that time he was reading law, and he was not the agent in general of his father. His father at that time did not have any special agent.

It is admitted that the reservation in the deeds of conveyance of the lots in the McKey Addition fronting south on 41st street is as follows:

"This deed shall not be construed to warrant the south 23 feet of the above-described lot as against any claim of the village of Hyde Park for street purposes."

Witness stated that this was the only reference in the deed to the 23 feet then used as a street. Witness stated that in making these sales of these lots a printed copy of an abstract of title was furnished to each purchaser, which abstract showed a copy of the plat of the subdivision and the property sold by lot and block according to the plat of the subdivision. There was nothing in the deeds further than the above reservation to indicate in any way that the property which the village was in possession of as a street was a portion of the lots sold. There was nothing in the deeds indicating any reference to the lots fronting west and east at the corners of Grand Boule-

92 vard and Vincennes avenue. None of these were sold. There was nothing in any of the deeds to indicate in any way that the property in controversy in this suit actually laid where 41st street is now used and occupied by the village. The deeds, while they did not warrant the south 23 feet of the lots as sold, embraced that 23 feet in the description of the lot.

Question by the court, addressed to the counsel for the plaintiff: Do you claim to have a right to show what the people said the time they bought the lots?

Judge DOOLITTLE, counsel for the plaintiff: I think the deed is our act, and that shows for itself that we deeded the street, but would not warrant it. We warranted the rest of the lot, but would not warrant that portion of it claimed for a street because there was a fight about it.

The COURT: You say that is a recognition of your claim at that time of a controversy between you and the village?

Judge DOOLITTLE: Yes, sir.

The plaintiff then recalled Mr. McKey, who testified that prior to this subdivision by partition the taxes were paid upon the land under the description of being the south ten acres, lying west of Vincennes avenue or road, of the northwest quarter of the northeast

quarter of section 3. That is the way the tax receipts ran every year down to the time of partition. After the partition the taxes have been paid down to and inclusive of 1887, under the lot description, including lot 11. I have the tax receipts for lot 11 from the time of the partition to 1887, inclusive.

93 Question by the COURT: You do not know whether the village has exacted taxes from you on the disputed strip?

A. That is all the evidence I can give.

The COURT: Do you say the abutting lots embrace these taxes?

A. I can only say we have paid the taxes by the lots as described in the partition.

The COURT: If lot 11 is embraced in this dispute about the ground, then you have paid the taxes; if it isn't, then you have not?

A. If we are wrong in this controversy there is no lot 11; no such thing in existence.

Question by Mr. MANN, counsel for the defendant: In your plat of the subdivision there is 33 feet marked "street." You did not pay any taxes on that street as a street?

A. Not since the partition; no.

Judge DOOLITTLE: If any question is made about acquiescence in the street I propose to prove by the witness that the assessments which have been made for street purposes have been resisted in the courts and elsewhere.

Mr. Mann, as counsel for the defendant, admitted that all assessments made upon the McKey property on 41st street had been contested, but all assessments on other streets had been paid.

Thereupon the plaintiff was called as a witness, who testified that lots 11 and 10, being the lots in question in this suit, fronting

94 on Grand Boulevard, on the corner of 41st street, was worth $225.00 per front foot on the boulevard.

On his cross-examination he stated that he had refused $200.00 a front foot.

The plaintiff then rested; which was all the testimony offered on the trial of said cause by either of said parties.

And thereupon and before the commencement of the argument to the jury the counsel for the plaintiff submitted to the counsel for the defendant the following questions of fact, in writing, to wit:

The jury are requested by the plaintiff to find specially upon the following questions of fact, to which they will answer yes or no, the quarter section referred to in said questions being the northeast quarter of section 3, town. 38 north, range 14 east, of the third principal meridian, in the county of Cook and State of Illinois:

1st. Does the survey of said quarter section by the United States show that said quarter section contained one hundred and fifty-seven and $\frac{23}{100}$ acres?

2nd. Did the canal commissioners sell said northeast quarter in such a way as to throw the shortage, if any, into the south half of said quarter section?

3rd. Did the canal commissioners so convey said quarter section

as to give the purchasers of the south half thereof full acreage as if the section had not been short?

95 4th. Did the father of the plaintiff and his co-tenant occupy the south part of the northwest quarter of said northeast quarter down to a line or division fence about twenty-three feet south of the present center of 41st street?

5th. Were not the south corners of the lots in McKey's Addition to Hyde Park, as shown by the plat in evidence, staked by the surveyor twenty-three feet south of the present north line of 41st street between Vincennes avenue and the Grand Boulevard?

6th. Did the village of Hyde Park ever pay any compensation to the plaintiff or his father for any portion of the land between Vincennes avenue and the Grand Boulevard as now occupied by 41st street?

7th. Did the plaintiff or his father ever intend to dedicate to the village of Hyde Park for a public street without any compensation to be paid therefor the piece of land lying between the north line of what is now occupied by 41st street between Vincennes avenue and the Grand Boulevard and a line drawn parallel thereto and about twenty-three feet south thereof.

8th. Did the plaintiff or his father ever intend to dedicate for a street or part of a street lot 11 and the south 2½ feet of lot 10, in block 1, in McKey's Addition to Hyde Park?

9th. Was there not established a division fence between the
96 owners of the Bowen lot and the McKey lot, which fence was on a line about 23 feet south of the present center line of 41st street?

And thereupon presented the same to the court and requested the court to require the jury to find specially upon such questions, to be stated to them in writing, as above.

Whereupon the court refused to submit said questions of fact or any of them to the jury; to which the counsel for the plaintiff then and there duly excepted.

Thereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY: The canal trustees owned the northeast quarter of section three (3), township thirty-eight (38) north, range fourteen (14) east. They conveyed the northwest quarter of this northeast quarter to P. F. W. Peck, describing it in the deed as the northwest quarter of the northeast quarter of the section, containing forty acres, more or less.

It is admitted that on June 1st, 1866, Edward C. Cleaver held the legal title to this land, and on that day he and his wife, by their deed, conveyed to Edward and Michael McKey, who were brothers, the south ten acres of the tract. In 1873 the village of Hyde Park laid out and opened 41st street sixty-six feet wide from Grand Boulevard to Vincennes avenue, the center of which was a line equidistant from the north and south lines of the quarter section, on the theory that this line was the true east and west boundary between the four quarters of the quarter section and the true southern
97 boundary of the McKey tract. The street thus laid out appears to have been used by the public without objection from

abutting proprietors until proceedings were commenced in the State court for partition of the McKey tract, which was in 1881 or 1882. I say, there appears to have been no objection by abutting proprietors, but it is for you to say, from the evidence, whether that is correct, and also to what extent the street is improved and used during this time. The commissioners who were appointed by the State court to make partition of the McKey tract were authorized by that court to subdivide the same into lots, blocks, streets, and alleys, which they did, and their report was confirmed by the State court. The decree of partition required the report of the commissioners as to subdivision to be approved by the trustees of the village of Hyde Park, and upon the plat which accompanied the report and was made a part of it a committee of the trustees recommended the approval of the subdivision, which was done as appears by the following entry on the plat: "Approved by the president and board of trustees this 8th day of September, 1882.—E. W. Hendricks, village clerk." This plat thus approved was made a part of the report of the commissioners, which the State court by its decree confirmed; but the village of Hyde Park was not a party to the suit for partition, and not being before the State court as a party it was not bound as such by the proceeding.

Samuel S. Greeley was employed by the commissioners to make the subdivision, and on the plat already referred to he certi-
98 fied that it correctly represented the subdivision as he surveyed and staked it. Instead of taking a line east and west through the center of the quarter section as the true original southern line of the McKey tract, which was indicated by the center of the street, Greeley ran and staked a line twenty-three feet south of this, and thus gave to the McKeys twenty-three feet of the street; and the partition and subdivision were made on the theory that this survey was correct. The land in dispute in this suit is part of this twenty-three feet, it having been assigned to the plaintiff as part of his share as one of the heirs of Michael McKey, who died in 1868. The plaintiff became of age in 1874, and lived at Jamesville, Wisconsin, until a year or two ago, when he removed to Chicago.

Greeley gave you his reason for refusing to recognize the center of the street as the true east and west boundary between the four quarters of the quarter section, and I will not detain you by rehearsing his testimony on that point.

You will bear in mind that the McKey ten-acre tract was taken off the south side of the northwest quarter of the northeast quarter, and you are instructed that the canal trustees conveyed to Peck one equal fourth of the quarter section, and that no subsequent conveyance of the trustees had the effect of either enlarging or diminishing that grant; and if you believe from the evidence that the center of the street is the center east and west line of the quarter section, then you are also instructed that it was and still is the true boundary line, and that the plaintiff is not entitled to the land described
99 in the declaration on the theory that the Greeley survey was correct.

But it is contended that even if the center of the street represents

the correct original line, the adjoining proprietors, by agreement, establish a boundry line still further south, which was represented by an old fence. You have heard the evidence touching that fence, and it is for you to say whether it is sufficient to establish such an agreement. We are not informed by the evidence by whose authority that fence was built, when it was built, or who occupied the lands north and south of it when it was erected. I will leave it to you to say, however, whether the evidence does establish those facts. If it was built by a squatter or trespasser when the lands were of little practical use, and were therefore neglected by the owners, that of itself would not support an implied agreement to treat the fence as a boundary line. The law calls for clear proof in support of an agreement between adjoining proprietors for the establishment of a boundary line different from the true one. I do not say that such an agreement may not be inferred from acts and conduct. For example, if two adjoining proprietors erect or maintain a dividing fence or hold possession and cultivate land on either side of a fence for a long time or for a considerable time, that of itself might warrant an implied agreement between them to make the fence their true boundary line; but, in this connection, you will bear in mind that Mr. Henry McKey, who is one of the children and heirs of Edward McKey, and as such inherited an interest in the McKey tract, testified from the time the street was laid out, in 1873, until the
100 Greeley survey he supposed the true boundary line was the center of the street, and that the old fence did not represent the true line. It was not, he said, until Greeley informed him in connection with the partition proceedings that the McKey heirs owned twenty-three feet of the street on the north side that he thought of the old fence as the original boundary line. How far Henry McKey then and prior to that time represented the plaintiff and the other owners it is for you to say. He certainly had acted as their agent to some extent. It is admitted that he had paid the taxes on the tract, and that he knew of the laying out and improvement of the street. It is for you to weigh all the evidence and say whether or not the McKeys, including the plaintiff, who became of age in 1874, knew of the laying out and improvement of the street and its use by the public, without protest or objection, until informed by Greeley that there was a mistake in the location of the south boundary line and that they owned twenty-three feet of the street. Mr. Henry McKey testified that he asserted the right of the McKeys to the twenty-three feet of the street when street assessments were made, and protested against such assessments; but did he do that before Greeley informed him the McKeys owned part of the street? If you believe from the evidence that in 1874, when the plaintiff attained his majority, he knew of the action of the village of Hyde Park in laying out, opening, and improving the street, and that thereafter and until the partition suit was commenced, in 1881 or later, the street was maintained and used with his knowledge and without objection by him, you are authorized to infer that he
101 consented to a dedication to that use of so much of the McKey tract as is embraced within the present limits of the street.

The owner of land may dedicate it to the public to be used as a street; and, having once done so, he cannot recover the land thus disposed of so long as it is used for that particular purpose; and, while there can be no dedication unless it be the intention of the owner to so dispose of his property, an intention to dedicate may be inferred if, with his knowledge and without objection, his land is improved and used for a number of years as a street. Was this street maintained, improved, and used from the time plaintiff became of age until the partition suit was commenced, in 1881 or later, without the knowledge of the plaintiff? During this time he resided in a neighboring State, and one of his co-tenants, Henry McKey, was a practicing attorney at Chicago, made no objection to the improvement and use of the street, and paid the taxes on the McKey tract for all the owners, including the plaintiff. If it is true, as claimed, that the opening and improvement of this street materially enhanced the value of the McKey lands, and thus greatly benefited the owners of the property, is it probable that during all this time the plaintiff did not know there was such a street? Is it or not probable that Henry McKey failed to inform his co-tenants of actions so material to their interests, if, indeed, they needed such information?

If you find that the village of Hyde Park acquired as against the plaintiff the right to the strip of land in dispute for use as a
102 public street, was that right lost by the action of the State court in confirming the report of the commissioners in the partition suit and the action of the village trustees in approving the plat, which was made on the basis of the Greeley surveys? I have already stated that the village of Hyde Park was not a party to the partition suit, and that it was not, therefore, concluded by the decree of the State court, and you are now further instructed that if the plaintiff had dedicated his interest in the strip of land in dispute for use as a street, subsequent action of the trustees of the village in connection with the subdivision of the McKey tract did not have the effect of restoring to the plaintiff what he had dedi cated to the public.

If you find for the plaintiff, the form of your verdict will be: We, the jury, find the defendant guilty, and assess the plaintiff's damages at one cent. If you find for the defendant, the form of your verdict will be: We, the jury, find the defendant not guilty.

Judge DOOLITTLE: If your honor please, in relation to the instructions we asked for, I will ask your honor to—some of those instructions are not covered by your honor's charge, I think.

The COURT: Which are those? You handed them to me so late I did not have time to look at them carefully; I read them over, however.

Judge DOOLITTLE: If your honor will hand them to me I will call attention to——

The COURT: You can name the points without reading them.

103 A JUROR: I would like to have something said in regard to which one of these surveyors was the more reliable, according to the legal status of the case.

The COURT: The court has already instructed you on that point so far as it can. The court has already instructed you that the true southern boundary of the McKey tract was an east and west line through the quarter section midway between the north and south lines.

The JUROR: But here comes conflicting evidence as between the two sets of surveyors.

The COURT: Is there any conflict here as to where that true line was? Mr. Greeley, as I recollect his testimony, does not say that he ran his line in the center of the quarter section. He ran it south of there twenty-three feet, and gave you his reason for doing so.

The JUROR: Yes.

The COURT: Now, I think you ought to understand the instructions of the court. I have already told you that Mr. Greeley had no right to change the center line. It is a question of fact for you to say, upon all the evidence, whether he did or did not stand by the center line.

The JUROR: I understand you more fully now.

Judge DOOLITTLE: If the court please, the point which I specially desired the court to instruct the jury upon was, that any deed or act of Edward McKey, the owner of the undivided half, could not dedicate or give any particular interest in the premises as against the minor children of Michael McKey.

104 The COURT: So far as that is concerned, I will say to the jury that the minor children, the minor McKey heirs, were not bound by anything that the adult heirs did; that no act of the adult heirs, indicating a dedication by them, is evidence of a dedication by any of the minor heirs.

Judge DOOLITTLE: And that therefore the deed——

The COURT: That is saying enough. That embraces the whole thing, of course.

Judge DOOLITTLE: I ask your honor, also, one more point——

The COURT: I am going to let the jury go. I think I have covered the case sufficiently; however, you may state your point.

Judge DOOLITTLE: This property being undivided property, and during all the time there being some infant heirs—there is one of the infant heirs not yet of age—that it is not competent to make a common-law dedication by deed or by parol either, which will bind——

The COURT: All I have to say to the jury on that point is this: This is not a controversy between the village of Hyde Park and an infant. Your client became of age in 1874, and if the village of Hyde Park took possession of this strip of land in 1873, and he knew of that possession, and the continued use and improvement of the street, and made no objection—if with full knowledge of everything that was done from 1874, when he was of age, until Mr. Greeley informed him for the first time that he was the owner or part owner of the 23 feet, then he cannot recover as against the village of Hyde Park.

105 You have nothing to do with the question of the rights of minors. You are dealing between a plaintiff who is of age, and became of age in 1874, and the village of Hyde Park.

Judge DOOLITTLE: If your honor please, the testimony, as I understand it, is that after the village opened the street the McKey lot lay open, uninclosed, until the partition suit was commenced. During that time when it lay open I ask your honor to charge the jury that non-action on his part, if he took no positive act showing that he intended to dedicate it, although he acquiesced in it——

The COURT: The jury may go. I have covered the case. You can take your exceptions to the instructions.

Judge DOOLITTLE: And the instructions not given?

The COURT: I will be very liberal on that, but they ought to have been presented before.

The jury thereupon retired.

Judge DOOLITTLE: In relation to the points of the charge to which we wish to except when the reporter writes them out I can mention those, and as to those points in the instructions we ask for where we might wish to save an exception we will do so. It is on those points where there is an apparent conflict between the charge given and our views.

The jury, having retired at about the hour of 10.45, returned into court for additional instructions about 2.15.

The COURT: Is it true that you desire further instructions about the case which was submitted to you? If so, on what points?

The FOREMAN: One gentleman desires further instructions from the court.

106 The COURT: State the question.

The FOREMAN: It appears to be that it is not decided in reference to the time that this old fence was recognized as the boundary line between the owners. The rest of the jury seem to be very well satisfied. Perhaps he can state his own views better than I can.

A JUROR: I would like to ask two questions. In the first place, is this on the first forty acres that was sold, the quarter of the quarter section. Is that all that we have to do with? And, further, has the old fence anything to do with establishing the real line?

The COURT: I thought I covered those points in the instructions.

Judge DOOLITTLE: It was upon that question of the line fence that the first of the instructions which I asked your honor to give particularly expresses our view of the law of the case.

The COURT: Which quarter of the section is this land?

Mr. MANN: It is the northwest quarter of the northeast quarter.

Judge DOOLITTLE: Upon that question as to the fence and how it should be regarded, if your honor please, the first instruction——

The COURT: The time for discussing the case is now past.

Judge DOOLITTLE: I do not discuss the question.

The COURT: I will endeavor to make this as plain to you as I can, not going over any of the instructions which are not involved in the question.

107 This little plat represents the northeast quarter of section 3, which all belonged to the canal trustees. This quarter is

the northwest quarter of the northeast quarter, which the canal trustees conveyed to Peck in 1849. The exact date is not material.

Judge DOOLITTLE: They sold it to him then, but the conveyance was not made until 1852.

The COURT: That is not material. Peck thus became the owner of the entire quarter of the quarter section. This other quarter, which is the northeast quarter of the northeast quarter, had previously been sold to some one else.

Judge DOOLITTLE: Peck was the first purchaser.

The COURT: I thought not, but that is not very material. Peck sold to Cleaver, and Cleaver sold ten acres off the south side of the northwest quarter of the northeast quarter to Michael and Edward McKey. I have drawn a line there indicating where it was.

Now, as I said to you before, when the trustees sold the northwest quarter of the northeast quarter to Peck they conveyed to him one-quarter of the quarter section, and the southern boundary of Peck's land was a line drawn from east to west through this quarter section and equidistant from the north and south lines—in other words, the center line of the quarter section. That was the true line as between the canal trustees and Peck.

A JUROR: A quarter of the quarter section, whatever that was.

The COURT: Yes; whatever it was, and upon the evidence
108 it is for you to establish that central line. Later the two McKey brothers bought this south ten acres, and their southern boundary was exactly the same as Peck's southern boundary, namely, a line drawn through the center east and west. It is for you to say whether the center of the street as it now exists represents the central line. I understand there is not much, if any, dispute between the parties or their counsel on that question. Mr. Greeley, in surveying the McKey tract for subdivision, refused to take the center line as the true southern line of the McKey property. He said it should be run south of there, and now the old fence comes up.

Now, I say to you again, as I did before, that you must treat this central line as the southern line of the McKey tract unless something occurred which entitled the McKeys to disregard the true line and claim a line further south as their boundary.

You have heard the evidence as to that old fence. It was there in 1868 or 1869—somewhere south of this.

Judge DOOLITTLE: Twenty-three feet, which is where Greeley's line is.

The COURT: Greeley establishes that line twenty-three feet south of the central line, a line equidistant from the north and south lines of the quarter section. There was an old fence there; the witnesses say it was there as early as 1868 or 1869. Some of the posts were decayed where they entered the ground and some of the boards were old and partially decayed. The fence was not firm—was shaken by the winds—and sections of it now and then were thrown down. There is no evidence when that fence was erected or
109 by whom it was erected. There is no evidence who occupied the lands on either side when it was erected. There is no

evidence whether the boards and posts were old when they were put there, and it is for you to say, and you have no right to go outside of the evidence, whether the conditions were such as to justify the inference that the owners of the land north and south of that fence agreed upon it as the true boundary line without reference to the center line. If they did that, where is the evidence of it? You have got the fact that there was a fence there. It does not follow that because a fence has existed ten years or twenty years or forty years that it is going to control boundaries, unless something else exists to show that the parties on either side treated it as the true boundary without reference to the actual boundary.

If, for instance, Wilson on one side and Peck on the other disagreed as to the line between them, and finally agreed upon a line represented by that fence, and the fence was accordingly built, that would establish it as the true line; or if Peck had lived on the north quarter and Wilson on the south quarter, with improvements there, cultivated these lands and maintained the fence between them for a long while, that might authorize the presumption of an agreement that the fence should be the boundary line. I leave it to you to say whether these lands at that time were in a condition to make them of much practical use or value.

Where lands are in such condition they are of little practical use, or where some of them owned by non-residents and some by residents, and one party makes a fence and the other neglects it,
110 pays no attention to it, it deserving no particular importance, as he is not cultivating his lands on the other side, that of itself would not justify a jury in saying that the fence established the correct line, regardless of the true original line.

You have no right to disregard the true boundary line unless you have an express agreement showing that the abutting proprietors changed it or unless the facts are strong enough to fairly authorize the presumption that such an agreement was made. Now, what are the facts here to justify the jury in believing that the proprietors on both sides of the line ever agreed to that fence as a boundary line? Of course it requires both sides to make an agreement. One cannot do it. One cannot change the true line without the consent of the other. No mere acquiescence—that is to say, mere silence or want of objection without regard to residence or other conditions—is sufficient to justify the jury in inferring that such agreement exists. It is unsafe for a jury or court to disregard the true line unless there is clear and satisfactory evidence supporting an agreement to establish a different line."

To certain portions of said charge, as hereinafter stated, the plaintiff's counsel then and there duly excepted. Those portions are as follows:

First.

"In 1873 the village of Hyde Park laid out and opened a street sixty-six feet wide from Grand Boulevard to Vincennes avenue, the center of which was a line equidistant from the north and

111 south lines of the quarter section, on the theory that this line was the true east and west boundary between the four quarters of the quarter section and the true southern boundary of the McKey tract. The street thus laid out appears to have been used by the public, without objection from abutting proprietors, until proceedings were commenced in the State court for partition of the McKey tract, which was in 1881 or 1882;" to which the plaintiff's counsel then and there excepted.

Second.

"The decree of partition required the report of the commissioners as to subdivision to be approved by the trustees of the village of Hyde Park and upon the plat which accompanied the report and was made a part of it. A committee of the trustees recommended the approval of the subdivision, which was done, as appears by the following entry on the plat: 'Approved by the president and board of trustees this 8th day of September, 1882.—E. W. Hendricks, village clerk.' This plat, thus approved, was made a part of the report of the commissioners, which the State court by its decree confirmed, but the village of Hyde Park was not a party to the suit for partition, and not being before the State court as a party it was not bound as such by the proceeding;" to which the plaintiff's counsel then and there excepted.

Third.

"If you believe from the evidence that the center of the street is the center east and west line of the quarter section, then you are also instructed that it was and still is the true boundary line,
112 and that plaintiff is not entitled to the land described in the declaration on the theory that the Greeley survey was correct;" to which the plaintiff's counsel then and there excepted.

Fourth.

"If you believe from the evidence that in 1874, when the plaintiff attained his majority, he knew of the action of the village of Hyde Park in laying out, opening, and improving the street, and that thereafter and until the partition suit was commenced in 1881 or later the street was maintained and used with his knowledge and without objection by him, you are authorized to infer that he consented to a dedication to that use of so much of the McKey tract as is embraced within the present limits of the street;" to which the plaintiff's counsel then and there excepted.

Fifth.

"During this time he resided in a neighboring State, and one of his cotenants, Henry McKey, was a practicing attorney at Chicago, made no objection to the improvement and use of the street, and paid the taxes on the McKey tract for all the owners, including the plaintiff;" to which the plaintiff's counsel then and there excepted.

Sixth.

"I have already stated that the village of Hyde Park was not a party to the partition suit, and that it was not, therefore, concluded by the decree of the State court; and you are now further instructed that if the plaintiff had dedicated his interest in the strip of
113 land in dispute for use as a street subsequent action of the trustees of the village, in connection with the subdivision of the McKee tract, did not have the effect of restoring to the plaintiff what he had dedicated to the public;" to which the plaintiff's counsel then and there excepted.

Seventh.

"The plaintiff became of age in 1874, and if the Village of Hyde Park took possession of this strip of land in 1873 and he knew of that possession and the continued use and improvement of the street and made no objection; if with full knowledge of everything that was done from 1874, when he was of age, until Mr. Greely informed him for the first time that he was the owner or part owner of the 23 feet, then he cannot recover as against the Village of Hyde Park."

To each of which said several portions of said charge above set forth the plaintiff's counsel then and there severally excepted.

Afterwards the jury, having requested to be further instructed, were called into court; whereupon further instructions were given, among which are as follows:

First.

"Peck sold to Cleaver and Cleaver sold ten acres off the south side of the northwest quarter of the northeast quarter to Michael and Edward McKey. I have drawn a line there, indicating
113½ where it was. Now, as I stated to you before, when the trustees sold the northwest quarter to Peck they conveyed to him one-quarter of the quarter section, and the southern boundary of Peck's land was a line drawn from east to west through this quarter section and equidistant from the north and south lines; in other words, the center line of the quarter section. That was the true line as between the canal trustees and Peck."

To which the plaintiff's counsel then and there excepted.

Second.

"Now, I say to you again, as I did before, that you must treat this central line as the southern line of the McKey tract unless something occurred which entitled the McKeys to disregard the true line and claim a line further south as their boundary.

You have heard the evidence as to that old fence. It was there in 1868 or 1869, somewhere south of this.

Judge DOOLITTLE: Twenty-three feet, which is where Greeley's line is.

The COURT: Greely establishes that line twenty-three feet south

of the central line—a line equidistant from the north and south lines of the quarter section. There was an old fence there. The witnesses say it was there as early as 1868 or 1869. Some of the posts were decayed where they entered the ground and some of the boards were old and partially decayed. The fence was not firm; was shaken by the winds and sections of it now and then thrown down. There is no evidence who occupied the lands on either side when it was erected. There is no evidence whether the
114 boards and posts were old when they were put there, and it is for you to say, and you have no right to go outside of the evidence, whether the conditions were such as to justify the inference that the owners of the land north and south of that fence agreed upon it as the true boundary line, without reference to the center line. If they did that, where is the evidence of it? You have got the fact that there was a fence there. It does not follow that because a fence has existed ten years or twenty years or forty years that it is going to control boundaries, unless something else exists to show that the parties on either side treated it as the true boundary, without reference to the actual boundary.

If, for instance, Wilson on one side and Peck on the other disagreed as to the line between them, and finally agreed upon a line represented by that fence, and the fence was accordingly built, that would establish it as the true line. Or, if Peck had lived on the north quarter and Wilson on the south quarter, with improvements there, cultivated these lands, and maintained the fence between them for a long while, that might authorize the presumption of an agreement that the fence should be the boundary line.

I leave it to you to say whether these lands at that time were in a condition to make them of much practical use or value.

Where lands are in such condition that they are of little practical use, or where some of them are owned by non-residents and some by residents, and one party makes a fence and the other
115 neglects it, pays no attention to it, it deserving no particular importance, as he is not cultivating his lands on the other side, that of itself would not justify a jury in saying that the fence established the correct line regardless of the true original line.

You have no right to disregard the true boundary line unless you have an express agreement showing that the abutting proprietors changed it, or unless the facts are strong enough to fairly authorize the presumption that such an agreement was made. Now, what are the facts here to justify the jury in believing that the proprietors on both sides of the line ever agreed to that fence as a boundary line? Of course it requires both sides to make an agreement. One cannot do it. One cannot change the true line without the consent of the other. No mere acquiescence—that is to say, mere silence or want of objection without regard to residence or other conditions—is sufficient to justify the jury in inferring that such agreement exists. It is unsafe for a jury or a court to disregard the true line unless there is clear and satisfactory evidence supporting an agreement to establish a different line."

To each of which said several portions of said second charge to the jury counsel for the plaintiff then and there severally excepted.

The counsel for the plaintiff requested the court to charge the jury and deliver to them eight several instructions, which are as follows:

116 I.

If the jury are satisfied from the evidence that after the conveyance by the canal trustees of the northwest quarter of the northeast quarter of section 3, town. 38, range 14 to P. F. W. Peck, and of the north half of the southwest quarter of the northeast quarter, to Robert S. Wilson, they as owners in their lifetime, or their grantees, enclosed their premises, and as owners of abutting or adjoining premises, built the ancient fence described in the evidence many years before 1866, the date of the deed from Cleaver and wife to Edward and Michael F. McKey of the south ten acres of the northwest quarter of the northeast quarter of said section, and that, after the building thereof, the several owners and their grantees of said adjoining and abutting enclosures occupied their several premises up to said fence as the actual boundary line between the adjoining premises, and that, after the said deed to Edward and Michael McKey, they took possession of and occupied the premises under their deed to the said fence as their southern boundary, and that the said Bowen, as the owner of the abutting premises south of said premises of the McKeys, also occupied his premises up to and according to said fence as the northern boundary of his said premises, then the court instructs the jury, if satisfied of these facts, that, although there is no proof of an express agreement that said fence should be the line of division and true boundary between the premises, these facts are such evidence of the acts and acquiescence of the owners of the adjoining premises in relation to such fence as a boundary that the jury are warranted in implying and finding that such an
117 agreement or understanding did exist, and that said fence was built as the boundary line fence between said premises.

That such agreement as to the practical location of a boundary line need not be in writing; that it may be by parol that it runs with the land and is binding upon all claiming under them; and the jury are further instructed, if they find these facts, that upon the record evidence in this case the title to the premises described in the declaration is in the plaintiff, and he is entitled to recover in this suit, unless the jury shall also find under the further instruction of the court, that the plaintiff, or his father in his lifetime, made either a common law or a statutory dedication of the premises for a public street.

II.

That the deed put in evidence of Edward McKey with George S. Bowen and others to the defendant, dated February, 1872, of his interest in the south 33 feet of the south 10 acres of the northwest quarter of the northeast quarter, being an undivided half, amounts to no

dedication as against his cotenant, the plaintiff in this suit, who was then a minor and non-resident.

III.

That the only proper course for the defendant to pursue where real estate is sought for public purposes as a street, which is held by minors as cotenants, is by proceedings to condemn, wherein minor heirs may be brought before a court and have guardians duly appointed.

118 IV.

If the jury are satisfied from the evidence that at the time of the execution of said deed of dedication by Edward McKey and George S. Bowen and others, in 1872, they and their grantors before them for many years and ever since the erection of the old fence described in the evidence had practically possessed, occupied, and cultivated the abutting premises upon each side of said fence as the practical boundary line between adjoining premises, the jury are warranted in finding and in the absence of any clear proof of an intention to do otherwise the jury are instructed to find that the said Edward McKey, by said deed, intended to dedicate his interest in the south 33 feet, as bounded on the south by said line fence, and that such deed would not amount to a common-law dedication of any part of the lands described in the declaration.

V.

The jury are further instructed if they are satisfied from the evidence that Mr. Greeley, in surveying and platting the subdivision, staked out the line of the street and each of the lots, including lot 11 and lot 10, described in the declaration, and that the board of trustees approved said plat as thus surveyed and staked by Mr. Greeley, — no part of the lands in controvesy in this suit were dedicated by said plat for street purposes, that such plat having been duly approved by said board of trustees, the defendant is estopped by it, and the plaintiff is entitled to recover in this action.

119 VI.

That although the defendant was not made a formal party to the partition suit it became subject to the decree, which required the plat to be approved by the defendant; that the defendant, by acting under that decree and approving the plat made by the commissioners appointed by the State court in partition, became so far a party to the decree as to be estopped from denying that it is bound by it, and the plaintiff is entitled to recover.

VII.

That the line of survey, as made by McClellan, locates the south line of the northwest quarter of the northeast quarter ten feet south

of the line of the premises described in the declaration, and, whichever theory of the surveyors be correct, the plaintiff, in the absence of any clear proof of an intention on his part to dedicate the premises as a public street, is entitled to recover.

VIII.

If the jury are satisfied from the evidence that after the defendant entered upon the premises, in 1873, the premises remained unenclosed until about the commencement of the partition suit, mere acquiescence and non-action by the plaintiff after he became of age, in 1874, would not be sufficient to warrant the jury to find an intention to dedicate the premises to public use.

120 Which said several instructions thus prayed for the court then and there refused to give; to which rulings and to each of them the plaintiff's counsel then and there severally excepted.

Thereupon the jury retired, and, after consideration, returned into court the following verdict: that "the jury found the defendant not guilty."

Whereupon, afterwards, the plaintiff, by his counsel, moved to set aside said verdict and to grant the plaintiff a new trial, among others, upon the following grounds, to wit:

1st. Because of error in the rulings of the court upon the trial, both in admitting and rejecting evidence.

2nd. Because of errors in the charge as given to the jury.

3rd. Because of error in refusing to give the several instructions asked for by the plaintiff.

4th. Because of error on the part of the court in refusing to require the jury to find specially upon material questions of fact stated in writing by the plaintiff and requested by the plaintiff to be submitted to the jury.

5th. There is not sufficient evidence to warrant the verdict, and especially to warrant the jury in finding a common-law dedication by the plaintiff of the premises in question.

121 & 122 6th. The verdict is contrary to the law and evidence in the case.

Whereupon the court overruled and denied said motion for a new trial; to the overruling and denying of which said motion counsel for the plaintiff then and there duly excepted.

Thereupon the court rendered judgment upon said verdict in favor of the defendant and against the plaintiff; to the rendition of which said judgment the plaintiff then and there duly excepted.

Now, inasmuch as the matters aforesaid do not appear of record, the plaintiff, by his counsel, presents this his bill of exceptions, and prays that the same may be signed and sealed by the court and made a part of the record in this cause, which is done accordingly.

WALTER Q. GRESHAM, [SEAL.]
Circuit Judge.

(Endorsed:) Filed Oct. 5, 1889. Wm. H. Bradley, clerk.

* * * * * * *

123 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is before you in said circuit court, between William D. McKey, plaintiff, and Village of Hyde Park, defendant, in an action of ejectment, a manifest error hath happened, to the great damage of the said William D. McKey, plaintiff, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1889, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U. S., Northern Dist., Illinois, 1855.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 114th year.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. William D. McKey, plaintiff in error, *vs.* Village of Hyde Park, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

124 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To The Village of Hyde Park, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein William D. McKey is plaintiff in error and The Village of Hyde Park is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice and acting circuit justice 7th circuit, by request of Mr. Justice Harlan, this 18th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

MELVILLE W. FULLER,
Chief Justice & Acting Circuit Justice, 7th Circuit.

124½ [Endorsed:] 20448. 366. Supreme Court of the United States. William D. McKey *vs.* The Village of Hyde Park. Citation to October term, A. D. 1889.

Due service of the within citation acknowledged and accepted this 19th day of September, A. D. 1889, and the defendant consents to the writ of error therein mentioned being returnable at a Supreme Court of the United States to be holden at Washington on the second (2nd) Monday of October, A. D. 1889.

HENRY V. FREEMAN AND
JAMES R. MANN,
Counsel for Def't.

125 In the Supreme Court of the United States.

WILLIAM D. MCKEY, Pl'ff in Error,
vs.
THE VILLAGE OF HYDE PARK, Def't in Error.

And now comes the plaintiff, by J. R. Doolittle, his attorney, and assigns for error in the court below, appearing upon the record, and prays for the reversal of the judgment of the court below the following errors:

1st. Because of error in the rulings of the court upon the trial, both in admitting and rejecting evidence; to which rulings the plaintiff, by his counsel, duly excepted.

2nd. Because of errors in the charge of the judge to the jury in the court below; to which rulings the plaintiff, by his counsel, duly excepted.

3rd. Because of error of the judge in refusing to give to the jury the several instructions asked for by the plaintiff; to which several rulings the plaintiff, by his counsel, then and there duly excepted.

4th. Because of error on the part of the court below in refusing to require the jury to find specially upon certain material questions of fact stated in writing by the plaintiff and requested by the plaintiff to be submitted to the jury.

5th. Because there is not evidence sufficient to warrant the verdict, and especially to warrant the jury in finding a common-law dedication by the plaintiff of the premises in question for a public street.

126 6th. Because the verdict is contrary to the law and evidence in the case.

J. R. DOOLITTLE,
Att'y for Pl'ff in Error.

127 Supreme Court of the United States. October Term, 1889.

WILLIAM D. MCKEY, Plaintiff in Error,
vs.
THE VILLAGE OF HYDE PARK, Defendant in Error. } No. 1421.

In error to the circuit court of the United States for the northern district of Illinois. Filed October 19, 1889.

It is hereby stipulated to submit the above-entitled cause upon printed arguments under rule 20, within the first ninety days of this term.

It is further stipulated, and both parties, under the provisions of section 9 of rule 10, do hereby designate, as the parts of the record to be printed by the clerk of this court the following, viz:

128 I.

The pleadings—that is, the declaration and plea—which on the clerk's index sent to attorney for plaintiff in error are numbered 6 and 9.

II.

The order empanelling the jury, and the verdict, which on said index are numbered 18 and 20.

III.

The judgment, which is numbered 30.

IV.

The bill of exceptions entire, which is numbered 40½ to 121, inclusive, on said index.

V.

The assignment of errors, which is number 125 upon said index.

All other parts of the record may be omitted in printing as deemed unnecessary by either party to the consideration of the points
129 in controversy.

Chicago, December 5, 1889.

J. R. DOOLITTLE,
Attorney for Pl'ff in Error.
JAS. H. ROBERTS,
Att'y for Def't in Error.

FRANK HUTCHINSON, *Of Counsel.*

130 [Endorsed:] Supreme Court U. S. October term, 1889. No. 1421. Wm. D. McKey, pl'ff in error, *vs.* The Village of Hyde Park. Stipulation to submit under 20th rule and as to printing record.

[Stamped:] Office Supreme Court U. S. Filed Dec. 7, 1889. James H. McKenney, clerk.

Endorsed on cover: N. Illinois C. C. U. S. No. 1421. William D. McKey, plaintiff in error, *vs.* The Village of Hyde Park. Filed October 19, 1889.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 1421.

WILLIAM D. McKEY,
Plaintiff in Error,
vs.
THE VILLAGE OF HYDE PARK,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

J. R. DOOLITTLE,
ATTORNEY AND OF COUNSEL FOR THE PLAINTIFF IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

No. 1421.

WILLIAM D. McKEY,
Plaintiff in Error,
vs.
THE VILLAGE OF HYDE PARK,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

The plaintiff in error brought an action in ejectment in the court below against the defendant to recover possession of all of lot 11, with $20\frac{58}{100}$ feet front on the Grand boulevard; and the south part of lot 10, being a strip about two and one-half feet wide off from the south side of said lot 10. (See Map, Ex. "D"; Rec., meaning printed record, $61\frac{1}{2}$.) The land in dispute, in all, fronts west twenty-three feet on the Grand boulevard, and runs east to an alley 150 feet, and is worth over $5,000.

The contention upon the trial was *not about the title* to the land. That was conceded to be in the plaintiff, in fee simple; *unless*, by his own acts or acquiescence, or by the acts and acquiescence of his ancestor, agents or co-tenants,

a common law dedication had been made to the village of Hyde Park of an easement in the land, to use it as a part of a public street. The village assumed to do so in 1873, and still continues to do so without authority, and unlawfully, as the plaintiff claims.

One of the questions, perhaps the main question in the case, as we shall see, turns therefore upon the question of a common law dedication. For a clear understanding of the case, it is proper to state with some detail the

Scurce and History of the Title, and of the Possession.

On the tenth of May, 1849, the Trustees of the Illinois and Michigan Canal (Rec., 10, 11), having perfect title to the whole of Sec. 3, T. 38, R. 14, in Cook county, sold to P. F. W. Peck, the north-west quarter of the north-east quarter, described as (we quote the words of the certificate of sale) "containing forty acres, more or "less, at the rate of fifteen dollars per acre, amounting to "$600," and executed to him a deed May 26, 1853. (Rec., 10, 11.)

By a connected chain of title from Peck (Rec., 10), the south ten acres of the Peck tract which embraces the land in dispute, was conveyed June, 1866, to Edward McKey and Michael F. McKey as tenants in common. Michael F. McKey was the father of the plaintiff. Both grantees resided at Janesville and were citizens of Wisconsin. In 1868, Michael F. McKey died intestate, leaving no widow but leaving the plaintiff, then only fifteen years of age, two brothers and one sister still younger than himself, as his only heirs, tenants in common with Edward McKey of the ten acres. His death occurred

five years before any claim was made to the use of the land in question by the defendant for a street, or, to take possession of it for that purpose. (Rec., 21, 22, see testimony of Henry McKey.)

The canal trustees, about two years after the sale and about one year before the deed to Peck (Rec., 12), sold to Robert S. Wilson and William B. Egan, the land adjoining on the south, to the land sold to Peck. The Wilson and Egan tract was designated as the north one-half of the south-west quarter of the north-east quarter of the section (quoting the language of the certificate), "containing 19 and 31/100 acres, more or less, at the rate of "$50 per acre, amounting to $965.50."

It was admitted on the trial, that George S. Bowen still held the title to this last described land by mesne conveyances from Wilson & Egan. (Rec., 12.) He held it at the time of, and before the purchase by Edward and Michael McKey, in 1866, of the ten acre lot north of it. The immediate grantors of the McKeys was Cleaver and wife.

There was a Division Fence erected between these Tracts.

Both tracts of land had long been enclosed. There was a fence between the Cleaver or McKey lot, and the Bowen lot, which had existed many years before 1866. (Rec., 7–9.) Precisely how long does not appear, nor does it appear by whom the *division fence* was built.

It was admitted on the trial, that both Peck, who purchased the land on the north side in 1849, and took his deed in 1853, and Robert Wilson, who purchased the land

on the south side, in 1852, and took his deed in April, 1857, were dead. (Rec., p. 27.)

No witnesses were called to state who built the fence or when it was built. Both of the original grantees were dead (Rec., 27), but all the witnesses stated that it was a board fence, built upon cedar posts. One witness saw it as early as 1865 or 6, and it was at that time an old fence. (Rec., 7.) Another one saw it in 1869. (Rec., 7.) The fence was then so old and the cedar posts were *so rotten* that the wind would blow it down, three or four lengths at a time. (Rec., 8.) It was a straight fence, running through from the Grand boulevard to Vincennes avenue.

Courts take judicial notice of the ordinary laws of nature. The time necessary for the decay of the ordinary cedar fence posts is from twelve to fifteen or even twenty years, before rotting off at the surface of the ground. According to common human experience, that fence must have been built at least twelve or fifteen years before 1869, or, as early as 1854 to 1857.

While the proof does not show the *exact time when, nor the persons by whom* this ancient fence was actually built, yet the presumption from the operation of natural law is so strong as to amount to a reasonable certainty that the time must have been not many years after the deed by the canal trustees to Peck, which was dated May 26, 1853, the first purchaser of the tract on the north, and immediately after the deed to Wilson and Egan, the first purchasers of the tract on the south.

The certificate was dated May 14, 1852, but the deed to Wilson was dated April 1, 1857. The law of the State of Illinois provided:

"When two or more persons shall have lands adjoining, "each of them shall make and maintain a just proportion "of the division fence between them, except the owner "of either of the adjoining lands shall choose to let such "land lie open." (Gross' Statutes of Illinois, 1869, page 343, Sec. 20.)

All the witnesses say that down to 1873, the time when the defendant by its agent broke the enclosure, and removed the fence in question, the lands on both sides of it were always, as long as known by any witness, kept enclosed. This fence between the land conveyed to Peck and his grantees, and the land conveyed to Wilson and Egan and their grantees, was actually used as a division fence, the lands north being used for pasturage, and the land on the south as a vegetable garden. (Rec., 7, 8, 9.)

The strong presumption, therefore, from the rotted condition of the division fence is, that it was built there by the original purchasers from the canal trustees, as a division fence under the statute between their adjoining lands.

Both tracts bounding west on the Grand Boulevard, the most northerly, being nearer the center of Chicago, was the most valuable and was purchased first. It was purchased at the canal trustees' sale of 1849, at $15 per acre. The southern one was purchased at the sale three years after, in 1852, but the value of it was then $50 per acre. It is not to be presumed that land of so great actual, and still greater prospective value, would be suffered to be occupied and fenced by squatters or by strangers, as intimated in the charge of the learned judge in the court below, as we shall see hereafter.

As the fence in question was built of boards on cedar posts, which in 1869 had already become so rotten that the wind breaking off the posts would blow it down three

or four lengths at a time, the presumption from the course of nature amounts to a moral certainty that it was built at least fifteen years before, built as early as 1854, and therefore was built by the original purchasers from the canal trustees as a division fence between their adjoining premises, as they were bound to do by law, if they did not suffer them to lie open, as they did not.

Shortage.

Another important fact is: the quarter section was understood to be, and when sold by the trustees was sold as short, north and south. The north part was more valuable, because it approached the city. It was sold first, and sold by acres. It is claimed the trustees thereby intended to throw the shortage south; that they did not intend to follow the government rule of survey, which throws the shortage north. For the purpose of showing this intention on the part of the trustees, the plaintiff put in evidence the trustees' sales of the whole of section 3. (Rec., 11, 12, 13, 14 and Plat, p. 14½.)

The expert testimony of Mr. Greeley, and his assistants, who surveyed and staked the plat of "McKey's Addition "to Hyde Park," hereafter mentioned, who were called as witnesses for the plaintiff, and the expert testimony of the surveyor, and his assistants, who run the line of the street for the defendant in 1873, and who were called as witnesses for the defendant, cover many pages of the record, from page 9 to page 21, inclusive, and from page 24 to page 27, inclusive.

A careful examination will show, however, that between these expert witnesses there was no disagreement in actual measurements upon the ground. They differed

only as to the *true theory* of survey. If Mr. Greeley was right in theory, the true line between the tracts was where the ancient fence stood, and the line upon which he platted "McKey's Addition" for the state Circuit court was correct. If the theory of the surveyor of Hyde Park, who opened the street, was correct, then the line of division would be twenty-three feet further north.

Without now stopping to inquire whether the theory of survey adopted by Mr. Greeley was legal or not, it appeared from his testimony that upon a survey which gave full distance north and south along the boulevard to the land sold to Peck, the line of division was found by him to be exactly where this ancient fence actually stood in 1873, and had stood for nearly twenty years, before it was removed by the defendant.

If his mode of survey was right, the fence was not only an anciently established division fence, presumed to have been built by the parties between their adjoining lands, but it was more; it was the true line of boundary. But for the present it is enough to say that the presumption is, that as Peck bought and paid for full forty acres, and as its value depended much on its extension north and south, and as Wilson and Egan bought and paid for only $19\frac{31}{100}$ instead of 20 acres, there is every reason to believe that in building the division fence, the adjoining proprietors *accepted as correct a survey made by some surveyor at that time upon the same equitable principle adopted by Mr. Greeley in his survey, viz: to give to each party the land intended to be sold, purchased and paid for, especially in measurements north and south, to and from the city of Chicago.*

In the absence of proof of such a survey when the

fence was built, and of actual proof of an agreement to make that fence the boundary line, the fact of its *having stood there and having been acquiesced in and practically used as such for nearly twenty years*, raises a strong presumption of such practical survey and location of it as a boundary line, between them.

Condition of Title and Possession in 1873.

Having traced at some length the history of the title and possession of the adjoining premises from the purchase of the north tract by Peck in 1849, and of the south tract by Wilson and Egan in 1853, for twenty years down to 1873, before any claim for a street was made by the village of Hyde Park, we stop for a moment to inquire as to the exact condition of its title and possession, at that time when the claim was first made.

Edward McKey, who purchased and took possession of the north part as tenant in common with Michael McKey, was still living, but in very feeble health, with his family in Janesville, Wisconsin. His brother Michael, who resided there also, had died, intestate, in 1868. The plaintiff in this suit, his eldest son, was still a minor, residing also at Janesville with his younger brothers and one sister, all minors, and sole heirs-at-law of Michae McKey.

In 1873 the defendant, without any authority of law, except the deed of Edward McKey, the co-tenant of the plaintiff, entered upon the p.emises, took exclusive possession thereof and removed the fence between the adjoining premises, and opened a street sixty-six feet wide. But instead of placing the center line of the street where the division fence stood, it lo ated it twenty-three

feet north of it. It removed the fence and placed it instead of thirty-three feet south, only ten feet south upon Bowen's land, and set it up there, as the south line of a street, sixty-six feet wide; and, it surveyed and staked out a line across the McKey premises, east of the Grand boulevard, fifty-six feet north of the old fence, instead of thirty-three feet; and it thereby took wrongfully as against the plaintiff and the minor co-heirs of Michael F. McKey, possession of the same (being the premises in question in this suit); and it has continued to hold and use the same, without any authority of law against them exclusively, for street purposes.

Thereby, as claimed by the plaintiff in error, without any compensation, and without any authority of law, as against him, the defendant, the village of Hyde Park has taken a strip of land not only thirty-three feet wide—the one-half of the usual width of a street—but fifty-six feet wide. It is for this twenty-three foot strip over and above the thirty-three feet or one-half the width of a street that this suit is brought.

As against the plaintiff, a minor and non-resident, the defendant unlawfully and without any authority took possession of this land. The enclosure was broken. The division fence was removed and the whole McKey ten acres was thrown open to the common. It remained open until 1880—for a period of about seven years—until after proceedings were commenced in partition in the State court hereafter mentioned, the plaintiff during all that time being a non-resident. The only semblance of authority was the deed of Edward McKey, one tenant in common. (Rec., 27.)

Under objection by the plaintiff, a deed was put in evidence, dated March, 1873, by which Edward McKey,

tenant in common with the plaintiff, and the then other minor heirs of Michael McKey, joined in a deed with George S. Bowen, the owner and occupant of the tract south of said fence, by which they quitclaimed the north thirty-three feet of the south tract, described as the north half of the south-west quarter of the north-east quarter, and the south thirty-three feet of the south ten acres of the north-west quarter of the north-east quarter of said section then lying west of Vincennes avenue, for the purpose of a street or highway. This quitclaim was executed before the defendant, by its agents, entered upon the premises and removed said fence.

This deed from Edward McKey was objected to by the plaintiff's counsel, as containing no legal authority from the plaintiff; but it was received under objection.

We do not discuss the exception to that ruling now. We simply remark in passing, that Edward McKey and George S. Bowen, who joined in said quitclaim deed, had occupied the lands up to said fence as the accepted boundary line between adjoining premises from 1866 to 1873, as they had been for a long time before occupied by their several grantors, they are therefore to be presumed to have deeded the lands according to their actual possession—according to the boundary as it had been *practically located* by said division fence, for nearly twenty years by them and by their grantors.

And, *even if Edward McKey, the tenant in common with the plaintiff, had power to bind him, which we deny, there is nothing in this deed to show that Edward McKey intended to change the boundary line of the land, and place it twenty-three feet north of the boundary line fence, as it was then practically located.*

But whatever *his* intentions may have been, we claim, and shall attempt hereafter to show, that he had no legal authority by any deed of his, to affect the rights of the plaintiff, then a minor, or of his infant co-heirs, and co-tenants.

No Condemnation Proceedings.

We repeat, the defendant, the village of Hyde Park, took no legal steps to condemn the lands in order to open the same as a street. But against the plaintiff, and the other heirs of Michael McKey, it made a simple trespass. It broke the close, ousted them, took exclusive possession, removed the fence and threw the lands open to common.

There was no necessity for any such high-handed measures. The law provided a way for taking the property of minors, co-tenants, and opening a street. The damages could be paid by assessing them upon the lands benefited. It specially points out the way in which the lands of minors could be taken, by making them parties and appointing guardians *ad litem*. There was no necessity for thus taking the law into their own lands. Although non-residents, and minors, that would not prevent proceedings against them, if properly taken; and that did not justify their illegal acts. Sec 2, Chap. 47, Statutes of Illinois, on Eminent Domain, provides:

"That in all cases where the right to take private property for public use without the owner's consent," etc., * * * "and the compensation to be paid," etc., * * * "can not be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or his name and residence is unknown, or he is a non-resident of the state, it shall be lawful for the party authorized to take," etc., * * * "to apply to the judge of the Circuit or County court either in vacation or

term time, where the said property or any part thereof is situate, by filing with the clerk a petition setting forth by reference his or their authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested therein as owners or otherwise, as appearing of record if known, or if not known, stating that fact and praying such judge to cause the compensation to be paid to the owner to be assessed. If the proceedings seek to affect the property of persons under guardianship the guardians, or conservators of persons having conservators, shall be made parties defendant, and if of married women their husbands shall also be made parties."

Death brought a New Complication.

Edward McKey, who became a serious invalid in 1872, died in 1875, intestate, leaving a widow and eight heirs-at-law, some of full age, but several were minors. His undivided half of the land held by him descended to them as tenants in common. (Rec., 21.)

This land remained unenclosed and open to the common, held by the heirs of Michael F. McKey and Edward McKey as tenants in common, several minors among them, until 1880.

At that time, seven years after the enclosure was removed by the defendant, while the partition proceedings hereinafter mentioned were pending, one English rented and occupied the McKey ten acres for a vegetable garden, pending the partition. He partially re-enclosed the premises, not by an exact or regular fence, but by stringing some barb wire where a few small oak trees were chopped down to make posts, in order to keep cattle off from his garden. That such wire fence was close along the north edge of the street as opened. (Rec., 29.)

The plaintiff put in evidence the original decree of the Circuit court of Cook county, in chancery, ordering, among other things, a partition of the McKey ten-acre tract. It appeared that all the parties interested in the same were properly brought before the court. Rec., 22.)

The plaintiff put in evidence, also, the final decree of October, 1882, and as a part thereof, the plat or map of McKey's addition to Hyde Park; which said map or plat, by the direction of said court, had been submitted to the president and board of trustees of the village of Hyde Park for their approval, and which was duly approved by them, and, being so approved by them, was acted upon and approved by the said court in its said final decree, and was made a part thereof. (See Exhibit "D," pp. 5, 6, 6½ of record.)

By such decree, lots 10 and 11 in block 1, the subject-matter of this suit, were allotted, set off and assigned in severalty to the plaintiff. (Rec., 22.)

Mr. Henry McKey, of the late law firm of Doolittle & McKey, a son of Edward McKey and one of his heirs at law, conducted the partition suit. He was called as a witness both by the plaintiff below and also by the defendant on the trial. A concise, yet clear and full statement of his testimony is very important; as one of the main questions in this case, viz: the question of a common law dedication, depends very much upon it, as will be seen hereafter.

When called for the plaintiff, he testified (Rec., 21): That Michael F. McKey, one of the grantees in the deed (from Cleaver and wife) introduced in evidence, died intestate in Janesville, Wisconsin, on the 19th day of December, 1868, leaving no widow or descendants of deceased children, but leaving him surviving, as his only

heirs at law, William D. McKey, the plaintiff in this case, who became of age in September, 1874; Thomas F. McKey, who became of age in February, 1877; George M. McKey, who became of age in February, 1879, and Harriet McKey (now Harriet McKey Smith), who became of age by the laws of Illinois in 1879, being then eighteen years of age.

That Edward McKey (the other grantee in the deed from Cleaver) died intestate on the 14th day of August, 1875, leaving him surviving his widow, Harriet McKey, and eight children; two of these children having since died, Maud, who died on the 25th of May, 1878, seven years of age, and John M., who died on the 7th day of June, 1881, who came of age on the 14th day of August, 1879; he died intestate, and was never married. The surviving children of Edward McKey who are still living are, Mary M. Stevens, who was of age when her father died; Henry McKey (the witness), who was of age when his father died; Gertrude H. Barbour, who was of age when her father died; Edward B. McKey, who was of age when his father died, being twenty-three years old; Harriet M. Tuthill, who was not of age by the laws of Wisconsin, where she lived, but was of age by the laws of Illinois when her father died, being then nineteen years of age, and Richard M. McKey, who will become of age in August, 1889.

That Edward McKey left no heirs but those named, and no descendants of deceased children.

He further testified that Michael F. McKey and Edward McKey (the grantees in the deed from Cleaver), and *all of their descendants, except the witness, lived in Janesville, Wisconsin; that the plaintiff in this suit always lived there until two or three months before the trial below, when he removed to Hyde Park.*

The above statement of his testimony is almost verbatim from the printed record, page 21.

When called as a witness on behalf of the defendant, to establish a common law dedication (Rec., 27, 28, 29, 30, 31), Mr. McKey testified that he was in Chicago in 1873; that his father, Edward McKey, was then living; that at the time of his death, his father owned an undivided half interest in the McKey tract; *that the witness had visited the premises in question several times with his father, during the later years of his life.*

Without now arguing the question of the legality of this evidence, it is proper to state that the counsel for the plaintiff objected to all testimony tending to show by the declaration or acts of the said Edward McKey, anything like a common law dedication, for the reason that Michael F. McKey, the ancestor of the plaintiff, died in 1868, five years before the street was claimed by the defendant, and because the plaintiff was a minor and had not become a resident of Chicago until 1888. The court overruled the objection; to which ruling the plaintiff's counsel excepted.

Under this ruling of the court, the witness further testified, that *he (the witness) understood that the street was to be run through this property; that he (the witness) was there at the time, and saw them tearing down the fence, which had been proven to exist (by the other witnesses) ,and taking possession of the property as he (the witness) supposed for a street;* that he then noticed that the center line of the street was put considerably north of that fence, that the street was then located where it now runs. They took possession of the land for a street. They did not lay out the exact lines. Witness never saw it staked out, but what appeared to be the center of the street was very

much north of the fence. Witness supposed it was to be a sixty-six foot street, and had no doubt that a part of the land in controversy in this case was included within the street at that time. Witness was satisfied that the street, as then laid out, coincided with the street as now laid out, but did not feel competent to swear to it exactly.

Witness made no objection to the opening of the street in that way, at that time, or for a number of years afterwards.

Payment of Taxes.

In regard to the payment of taxes on this property for a number of years *both before and after the date of 1873, Mr. McKey testified that he did not furnish the money for the payment of the taxes, but he acted as the fiscal agent who took the money; that he handled the money, and gave it or a check to the tax office. That he paid the taxes as agent of that property from 1873, until and including 1887.*

He further testified, that *when he saw the street opened he* (the witness) *supposed it was all right; that it was opened on the right line, and that the fence was wrong. He knew nothing about it at all, but noticed that they did not follow the fence as the center of the street. Witness supposed there was a mistake, and that the land was not fenced right,* BUT NEVER SAID ANYTHING ABOUT IT, *and never discovered the actual condition of things until in conducting the partition suit, when Mr. Greeley, the surveyor, told him of this error.* (Rec., 28, 29, 30.)

This court will please bear in mind the important fact that the plat of "McKey's Addition" was approved by the president and board of trustees of Hyde Park, October 8, 1882. (See approval on the plat, Ex. D.)

And the no less important fact that the Circuit court, in the proceedings in partition required the plat to be submitted to the president and board of trustees of the Village of Hyde Park for their approval, and that such approval by them was submitted to said court before entering a final decree of partition, and such approval was made the basis of and a part of the decree. (Rec., 5, 6.)

Mr. McKey, the witness, further testified on behalf of the defendant, that lots in that addition (Rec., 28), were sold, and the deeds were made to the parties by describing the lot, and containing the condition that the warranty in the deed would not extend to any portion of the lot claimed by the Village of Hyde Park as a street; and he also testified that these purchasers had since gone on and built their fences on the present line of the street, (as claimed by the defendant.) It appeared by the testimony of the witnesses that they built houses also.

It was admitted on the trial below that the reservation in the deed of conveyance of the lots was as follows (Rec., 30):

"This deed shall not be construed to warrant the south "twenty-three feet of the above described lot as against "any claim of the Village of Hyde Park for street pur- "poses."

On his cross-examination by the plaintiff's counsel, (Rec., 28, 29), Mr. McKey further testified that, in his opinion, no act had been done by any one of the McKey heirs to recognize the the street as claimed by the village of Hyde Park since the date of the final decree in partition, October 6, 1882; that since the land was partitioned he, (the witness) had had the entire management of it, all the parties except two being non-residents. That he had constantly brought up this question (of the street)

before the village of Hyde Park. That he had filed a petition and had interviews with them a great many times. *That a dozen or more lots had been sold. Parties would come to witness to buy. They did not desire to sell on account of this question about the street, but people would offer to buy and run the risk of the street.*

Mr. McKey further testified, (Rec., 29) that *after tearing down the fence in 1873, the land remained open just as it was left by the village authorities, until one John English took it and put some sort of an irregular wire enclosure along the south side. Witness could not now state whether it followed the line of the street or not. The posts he remembered were simply pieces of oak trees; this was in 1880; there were small oak trees on a part of the land and he made fence posts of them, which only remained until the partition. English fenced it in. When the land was partitioned in 1882 he left. English was there during all the partition proceedings, and rented on a small rent.*

Witness testified that *during all that time after the opening of the street (in 1873) until the fall of 1888, William D. McKey, the plaintiff in this suit, was a resident of the State of Wisconsin. He came of age September, 1874, after the opening of the street and the tearing down of the fence.*

Witness had no recollection of Edward McKey being upon the land after 1872.

In 1872 Edward McKey was in Chicago a good deal; his health was bad, and had been for a good many years, during the summer. He lost a building in the big fire (October, 1871), and was rebuilding in 1872, but his health was pretty bad. After that was finished he seldom came to Chicago. He used to run down here in

1872, after the big fire, and ask witness to go with him to different lands he was interested in; that was the way witness happened to be down there. After his building was finished he seldom came to Chicago to stay more than a day; *have no recollection of his being there after 1873.*

Witness further testified *that 41st street was occupied by the village when the partition proceedings were commenced, but at that time witness thought it was all right. The Village of Hyde Park was not made a party to these proceedings.*

Witness knew about the deed of dedication from Edward McKey to the Village of Hyde Park, but did not know as he had anything to do with it himself, although he knew there was such a deed given. (Rec., 30.) *At that time he was reading law, and he was not the agent in general of his father; his father at that time did not have any special agent.*

The deeds (of lots in McKey's Addition), while they did not warrant the south twenty-three feet of the lots as sold, embraced that twenty-three feet in the description of the lot.

Upon this point, as to these deeds, in answer to a question by the court below to the plaintiff's counsel, during the trial, Judge DOOLITTLE, counsel for the plaintiff, said: "I think the deed is our act, and that shows for itself that "we deeded the street, but would not warrant it. We "warranted the rest of the lot, but would not warrant "that portion of it claimed for a street, because there was "a fight about it."

Mr. McKey was recalled as a witness for the plaintiff, and testified that prior to the subdivision by partition, the taxes were paid upon the land under the description

of the south ten acres of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Section 3, lying west of Vincennes avenue. That is the way the tax receipts ran every year down to the time of partition. *After the partition the taxes were paid down to and inclusive of 1887, under the lot description, including lot 11.* "*I have the tax receipts for lot 11 from the time "of partition to 1887, inclusive.*" *But no taxes were paid upon the thirty-three feet marked as street on the plat of subdivision.* (Rec., 31.)

It was admitted by counsel for the defendant on the trial below that *all assessments on the McKey property on 41st street had been contested, but all assessments on other streets had been paid.* (Rec., 31.) It was also admitted that the houses built on 41st street had been built since 1882, the time of partition, and that none of them were built by the McKey heirs, but were built by the purchasers from the McKey estate. (Rec., 26.)

The property in controversy is worth more than $5,000.

The bill of exceptions *contains all the testimony offered on the trial by both parties.* (Rec., 31.)

There *was no proof given by the defendant on the trial to show any acquiescence in a common law dedication of the premises beyond what is contained in the testimony of Mr. McKey and the deed of Edward McKey, above mentionad.*

We have therefore set out in full all of his testimony which bears upon these questions, in order that this court may be fully prepared for the consideration of the questions discussed in our argument hereafter. Nowhere in the evidence does there appear any act or declaration of the plaintiff in this suit, tending to show any intention to make a common law dedication of the premises in question for street purposes, after he became of age in 1874. His father died in 1868, five years before the street was claimed by the defendant.

Assignment of Errors.

I.

The court erred in parts of the *first* and *second* charges to the jury; to which several parts the plaintiff, by his counsel, severally and duly excepted. They are set out on pages 39 to 43, inclusive, of the printed record.

II.

The court erred in refusing to give to the jury, as requested by the plaintiff's counsel, the eight several instructions, which are set out in the record on pages 43 to 45, inclusive.

III.

The court erred in denying the motion to set aside the verdict, and in the rendition of said judgment, as set out on page 45 of the record.

IV.

The court erred in its rulings upon the trial, both in admitting and rejecting evidence; to which several rulings the plaintiff, by his counsel, duly excepted, as appears on pages 23, 24, 27, 28, 29, of the record.

V.

The court erred in refusing to require the jury to find specially upon certain material questions of fact, stated in writing by the plaintiff's counsel, and requested by him to be submitted to the jury; as appears on pages 30, 31, of the record.

Authorities Cited in this Brief.

Revised Statutes of Illinois (1869) of Gross, Sec. 20, Chap. 51. (Set out in full at page 5 of this brief.)

Starr & Curtis' Annotated Statutes of Illinois, Chap. 47, Sec. 2, (set out on pages 11 and 12 of this brief); also, Sec. 14, Chap. 115, do. (set out on page 36 of this brief); also, Sec. 63, Chap. 24, do., pages 462–3 (set out on page 36 of this brief); Sec. 179, Chap. 24 (set out on page 39 of this brief); Sec. 3, 11 and 12, Chap. 109, page 1,768 (set out on pages 36 and 40 of this brief); Secs. 58a 58b Hurd R. Statutes, 1889, pages 1,018, 1,019 (set out on page 46 of this brief.)

Irwin v. *Dixon*, 9 How., 10, p. 30.
Cincinnati v. *White*, 6 Peters, 431.
Kelly v. *Chicago*, 48 Ill., 388.
Bauer v. *Gottmanhausen*, 65 Ill., 503.
Lull v. *Chicago*, 68 Ill., 518.
Kyle v. *Town of Logan*, 87 Ill., 64, p. 67.
Dunham v. *Hyde Park*, 85 Ill., Rep. 569, 577.
Chicago v. *Johnson*, 98 Ill., 613.
Herhold v. *Chicago*, 108 Ill., 467.
Peyton v. *Shaw*, 15 Bradwell, 192–196.
Robertson v. *Wellsville*, 1 Bond, 83.
Lonsdale v. *Portland*, Deady Rep., 44.
Lansdown v. *Elderton*, 14 Vesey, 512.
Gray v. *Gray*, 1 Beavan, 199.
Harding v. *Harding*, 4 Myl. & Cr., 514, and on appeal by Lord Lyndhurst.
Requea v. *Rea*, 2 Paige, 339, 341.
Miller v. *Collyer*, 36 Barb., N. Y., 250.

Cazet v. *Hubbell*, 36 N. Y., 677, 680.
Freeman on Cotenancy, Sec. 169, Sec. 199.
Bloomington v. *Bloomington*, 126 Ill., 221.
McIntyre v. *Storey*, 80 Ill., 127, 130.
Chicago v. *Stinson*, 124 Ill., 510.
Bigelow on Estoppel, 558.
Freeman on Co-tenancy, § 169, 199–205, inclusive.
Gates v. *Salmon*, 35 Cal., 588.
Sutter v. *San Francisco*, 36 Cal., 115.

ARGUMENT.

I.

THERE IS NO SUFFICIENT EVIDENCE IN THE CASE TO WARRANT THE JURY TO FIND AS AGAINST THE PLAINTIFF A COMMON LAW DEDICATION OF THE PREMISES CLAIMED FOR A STREET.

The bill of exceptions certifies that it contains all the testimony offered on the trial of the cause by either of the parties. (Rec., 31.) This enables us to present this question as matter of law, as upon demurrer to the evidence. The same question was presented to the court below on a motion to set aside the verdict. (Rec., 45.) We quote as follows:

"The plaintiff, by his counsel, moved to set aside the "verdict and to grant the plaintiff a new trial." "Be- "cause there is not sufficient evidence to warrant the ver- "dict, and especially to warrant the jury in *finding a com- "mon law dedication by the plaintiff of the premises in "question.*"

The same question is raised by the plaintiff's exception to a part of the charge, upon the subject of common law dedication (Rec., 41), which is as follows:

"The plaintiff became of age in 1874, and if the vil- "lage of Hyde Park took possession of this strip of land "in 1873, and he knew of that possession, and the con- "tinued use and improvement of the street, and made no "objection; if, with full knowledge of everything that "was done from 1874, when he was of age, until Mr. "Greeley informed him for the first time that he was

"owner, or part owner, of the twenty-three feet, then he "cannot recover as against the village of Hyde Park."

The same question is raised in excepting to the refusal of the court to give the eighth instruction prayed for by the plaintiff's counsel (Rec., 45), which is in these words:

"If the jury are satisfied from the evidence that after "the defendant entered upon the premises in 1873, the "premises remained unenclosed until about the com- "mencement of the partition suit, *mere acquiescence and* "*non-action by the plaintiff after he became of age would* "*not be sufficient to warrant the jury to find an intention* "*to dedicate the premises to public use.*"

In discussing this important question thus raised in three different modes, we remark:

I.

We think it will be conceded by counsel on the other side, that in the statement of the testimony of Henry McKey in our brief, we have substantially given *all the testimony in the case which bears upon the question of a common law dedication.* At all events, we feel assured that a careful reading of all the testimony in the record will not disclose any other facts which bear upon that question. They are briefly these:

The plaintiff's father died in 1868, five years before Hyde Park entered upon the premises in 1873, surveyed the street and removed the ancient division fence. The plaintiff was then a minor and a non-resident, a co-tenant with other minor heirs of one *undivided half* interest in the McKey tract. By the removal of the fence by the defendant in 1873, the premises were thrown open, and remained so, until partition proceedings were commenced. The premises continued to be held by tenants in common

—minors and non-residents—until after the partition decree in 1882.

2.

Though the plaintiff became of age in 1874, he was then a non-resident, and always remained so until about the time of the trial, and there is no proof that he ever saw the premises, or lived in Chicago until he came to live there in 1888, two or three months before the trial below.

3.

There is no proof he ever *said one word* or *did one act*, or that *he ever assented to or authorized one word or act by others* in relation to said premises, except to advance his share of the taxes, until the partition suit was ended. And then by his agent from 1882 until 1887, he was assessed and he *paid taxes upon lots 10 and 11 to the collector of taxes in Hyde Park* and holds receipts therefor.

4.

His cousin, Henry McKey, the witness referred to, was his agent to pay these taxes. But he had *no other power, express or implied.* He had no power to sell or to convey; much less a power to dedicate. Henry McKey says, in 1873, he was present and saw the surveyors of Hyde Park running the center line of what he supposed was a street, north of the division fence. That when he saw the street opened he (the witness) "*supposed it was* "*all right; that it was opened on the right line, and that* "*the fence was wrong. He knew nothing about it at all, but* "*he never said anything about it until in conducting the* "*partition suit, when Mr. Greeley, the surveyor, told him* "*of his error.*" (Rec., 28.) But this occurred when the plaintiff was a minor in 1873.

Previous to the commencement of the partition, there

is no evidence to show that Henry McKey had any other agency as to the McKey premises, than simply to receive money and to pay and take receipts for the taxes. After the partition he had the management of the property.

It is preposterous and absurd to say that an agent with so little power as he had before the partition could, *even if he expressly intended to do so, by any act or declaration*, grant or dedicate any easement in the premises; much less create such an easement by *his mere acquiescence.*

He, the witness, says he *supposed the fence was wrong, and the survey* of the defendant's surveyors was right. But he states positively, that he did not say anything about it.

The mere supposition of the witness as to the correctness of a survey—a matter of which he knew nothing and said nothing—could not have the effect to dedicate by metes and bounds land not held in severalty, but in common, by minors and non-residents. This is too obvious to require argument.

II.

THE TITLE WAS SO HELD ALL THE TIME AFTER THE DEATH OF MICHAEL F. MCKEY, IN 1868, UNTIL PARTITION BY THE COURT IN 1882, THAT NO COMMON LAW OR STATUUORY DEDICATION COULD LEGALLY BE MADE OF ANY SPECIFIC PORTION BY METES AND BOUNDS.

In this connection it should be said that the quitclaim deed of Edward McKey was of no effect as against the plaintiff, his co-tenant, *in common.* We have the excellent authority of Lord Coke that a lease accepted even by a *joint tenant*, cannot bind his co-tenant.

"If one joyntenant in fee take a lease for years of an estranger by deed indented and dyeth, the survivour shall

not be bound by the conclusion, because he claymes above it and not under it." (Freeman on Cotenancy, Sec. 169.)

But, however the rule may be as to *joint tenants*, nothing is better settled than that the act, declaration or deed of one tenant *in common* is of no effect as an admission against his co-tenant, and cannot bind or affect his rights.

Freeman on Cotenancy, Sec. 199.

It may be good as against the co-tenant who is of age and makes his deed. It may operate by way of estoppel as against him, and may confer upon the grantee his rights. This has been held by high authority in modification of the old rule laid down, "that deeds made by one co-tenant conveying a part of the estate of a co-tenancy by metes and bounds are *undoubtedly void, and the other co-tenants may at all times so treat them.*"

This old rule was first questioned and modified in Ohio. The decisions of Ohio were affirmed in Virginia; and, quoted with approbation in two careful and well considered judgments of the Supreme court of California by Chief Justice Field, in which the received doctrine of the older states of Massachusetts, Maine and Vermont was reviewed and qualified. But in that case the learned judge said: "The rights thus assigned to the grantee are precisely those pertaining to the grantor in the special tract; no more, no less. The grantor, before his conveyance of the special tract held his individual interest subject to the contingency of the loss of it, if, on partition of the general tract the special tract should be allotted to one of his co-tenants. The grantee then acquires all the interest of his grantor in the special tract, and that interest is a tenancy in the special tract in common with the cotenants of his grantor, but his conveyance did not sever the special tract from the general tract, so far as his cotenants are concerned, and the general tract is therefore

liable to partition, so far as the co-tenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made."

Gates v. *Salmon*, 35 Cal., 588.
Sutter v. *San Francisco*, 36 Cal., 115.
Freeman on Cotenancy, Secs. 199-205, inclusive.

We shall show hereafter that the village of Hyde Park, the grantee of Edward McKey, though not made a formal party to the partition suit, actually took part in and approved the plat of partition by which the premises in question were duly set off in severalty, in fee simple to the plaintiff. Before doing so, other questions are worthy of consideration.

First. The deed put in evidence by the defendant, executed by Edward McKey and George S. Bowen, is to be construed as to the boundary line between their adjoining lands, *according to their actual possession*, of which the division fence was, and for nearly twenty years had been, the actual, practical boundary.

This point was distinctly raised in the court below, and the court erred in refusing to give the *first* and *fourth* instructions requested by the plaintiff. (See these, at length, Rec., 43, 44.) We call special attention to them, without reprinting them; and also to our statement above as to that ancient fence. Both of these instructions should have been given to the jury.

Second. That division fence was upon *the true line of boundary, according to the survey of Mr. Greeley.*

All the certificates of sale, and deeds by the canal trustees, of the whole quarter section, and also a plat (Rec., 10, 11, 12, 13 and 14), were put in evidence to

show this. With these before him, Mr. Greeley, a surveyor of great experience, made the survey. In his testimony he explained at length the theory of his survey. (Rec., 14 to top of 21, inclusive.)

Upon that theory he made the plat of the addition in 1882, and staked the south line of lot 11 twenty-three feet south of the north line of the street, as laid out by the surveyor of Hyde Park in 1873. He staked it out thirty-three feet north of where the division fence stood before it was removed by the defendant, leaving a strip thirty-three feet wide upon the plat south of lot 11, to be dedicated by said plat for use as a public street. That plat so surveyed and staked by him, with a street to be dedicated according to those boundaries, was submitted to and approved by the president and board of trustees of Hyde Park.

The effect of that approval we discuss elsewhere, and do not repeat it here. We refer to it in this connection, however, to show that from the deed of Edward McKey, *even as against himself and his heirs, it can only be said that he intended to dedicate off from the south side of the ten acre tract*, of which he was tenant in common of the one undivided half interest for a street, *the thirty-three feet bounded on the south by the division fence between the McKey tract and the Bowen tract, and no more.* His deed is not evidence of his intention to dedicate the premises, as claimed by the defendant, for a street.

When the defendant took that deed it was bound to take notice of his actual possession, and the possession of his grantors, according to that fence, for nearly twenty years.

Third. But whatever may be said as to Edward McKey and his heirs, we repeat, one thing is certain; this deed did not bind or affect his co-tenants in common, the

minor heirs of Michael F. McKey, of whom the plaintiff was one, when that deed was executed. It did not and could not give any legal authority to the defendant to enter and take exclusive possession, and oust them from the premises in question.

We come right back to the important question, whether the plaintiff, after he arrived at his majority in 1874, made a common law dedication of the street as laid out in 1873.

III.

IT IS THE SETTLED LAW OF THE STATE OF ILLINOIS THAT MERE NON-ACTION, IN OTHER WORDS, A MERE OMISSION TO ASSERT TITLE AS AGAINST THE PUBLIC, WILL NOT RAISE ANY IMPLICATION OF AN INTENTION TO DEDICATE PRIVATE PROPERTY TO PUBLIC USE.

Bloomington v. *Bloomington*, 126 Ill., 221.
McIntyre v. *Story*, 80 Ill., 127, 130.
Chicago v. *Stinson*, 124 Ill., 510.
Kelly v. *Chicago*, 48 Ill., 388.

A fortiori, when the land is unenclosed.

Chicago v. *Johnson*, 98 Ill., 618,
Herhold v. *Chicago*, 108 Ill., 467,
Peyton v. *Shaw*, 15 Brad., 192, 196.

and especially when the land is held by tenants in common, and some of them minors.

From non-action and silence, from acquiescence under such a state of things, neither was the court or jury warranted to infer an intention to dedicate; and, the *intention to dedicate* to public use is absolutely essential where "private property is taken for public use without just "compensation," in violation of Art. 2, Sec. 13, of the constitution.

IV.

THERE MUST BE "DELIBERATE, UNEQUIVOCAL AND DECISIVE ACTS AND DECLARATIONS MANIFESTING A "POSITIVE AND UNMISTAKABLE INTENTION TO PERMANENTLY ABANDON HIS PROPERTY TO THE SPECIFIC "PUBLIC USE," TO MAKE A COMMON LAW DEDICATION.

Bigelow on Estoppel, 558.
Irwin v. *Dixon*, 9 How., 10, 30.
Kelly v. *Chicago*, 48 Ill., 388.
Kyle v. *Logan*, 87 Ill., 67.
Chicago v. *Johnson*, 98 Ill., 618.
Herhold v. *Chicago*, 108 Ill., 467.
Peyton v. *Shaw*, 15 Brad., 192, 196.
Robertson v. *Wellsville*, 1 Bond., 83.
Lonsdale v. *Portland*, Deady, Rep., 44.
Bloomington v. *Bloomington*, 126 Ill., 221.
(A recent and very important case.)
McIntire v. *Storey*, 80 Ill., 127, 130.
Chicago v. *Stinson*, 124 Ill., 510.

V.

THE COURT CLEARLY ERRED IN THE SEVENTH INSTRUCTION, EXCEPTED TO UPON THIS SUBJECT; WHICH IS IN THE FOLLOWING WORDS (REC., 41):

"The plaintiff became of age in 1874, and if the village of Hyde Park took possession of this strip of land in 1873, and he knew of that possession, and the continued use and improvement of the street, and made no objection; if with full knowledge of everything that was done from 1874, when he was of age, until Mr. Greeley

informed him for the first time that he was owner, or part owner, of the twenty-three feet, then he cannot recover as against the village of Hyde Park."

By this instruction he substantially decided that mere non-action and acquiescence, was of itself not only evidence, but *conclusive evidence, from which the jury were directed to find a verdict against him.*

The jury were not even allowed to weigh the evidence to learn his intention. They were not allowed to consider that the lands were held by tenants in common, one of whom was still a minor at the trial. They were not allowed to consider that according to law, there was no way before the partition suit in which Hyde Park could legally acquire the right to such street, except by proceeding under the statute to bring all parties before the court. Besides, the court wholly mistook the testimony in saying that Mr. Greeley gave the plaintiff any such information.

This instruction was clearly erroneous.

VI.

THE COURT ERRED IN NOT GIVING THE SECOND AND THIRD INSTRUCTIONS, REQUESTED BY THE PLAINTIFF. (Rec., 43, 44.)

It is enough to call attention to them, as the questions involved in them have already been discussed.

VII.

THE COURT ERRED IN REFUSING TO GIVE EFFECT TO THE PLAT OF PARTITION BY THE CIRCUIT COURT OF COOK COUNTY, ALTHOUGH BY ITS DIRECTION THAT PLAT WAS SUBMITTED FOR APPROVAL TO THE PRESIDENT AND BOARD OF TRUSTEES OF HYDE PARK; AND WAS DULY APPROVED BY THEM.

The court, therefore, manifestly erred in refusing to give to the jury the *fifth* instruction, requested by the plaintiff, which is as follows (Rec., 44):

"The jury are further instructed, if they are satisfied from the evidence that Mr. Greeley, in surveying and platting the subdivision, staked out the line of the street and each of the lots, including lots 11 and 10, described in the declaration, and that the board of trustees approved said plat as thus surveyed and staked by Mr. Greeley, no part of the lands in controversy in this suit were dedicated by said plat for street purposes. That such plat having been duly approved by the said board of trustees, the defendant is estopped by it, and the plaintiff is entitled to recover in this action."

We earnestly maintain that this instruction was clearly right, because:

The approval of the plat by the president and board of trustees of the village of Hyde Park, in proper form under the seal of the defendant, was a public official act by a political body within their legal jurisdiction, and it is therefore binding upon the defendant. It is equivalent to an estoppel upon a private party by deed.

1.

The witness Greeley says he "staked the south line of "the lots and the north line of the street, as laid out on "the plat, twenty-three feet south into what was appar- "ently a street. The stakes were all driven into the "grade of the street." (Rec., 10.)

The witness Rossiter (Rec., 25), says: "Any sur- "veyor could have gone, after McKey's Addition was "laid out, and staked and found it did occupy a part "of what is now called 41st street."

The witness Goodrich (Rec., 6), says, that he "was "one of the commissioners appointed by the court to "make the partition, and was at the same time president "of the board of trustees of the village of Hyde Park; "that he knew where the stakes were driven by the sur- "veyors who made the plat; and he knew that the land "as staked took twenty-three feet off the street; that at "the time the board approved the plat they knew" these facts.

The certificate of the surveyor upon said plat says "the "above plat correctly represents said subdivision as sur- "veyed and *staked by me*." (See Exhibit "D.")

With full knowledge of these facts, the president and board of trustees of the village of Hyde Park approved said plat.

An inspection of Exhibit "D" (Rec., 6½), shows that approval in due form, under seal.

2.

Section 63, Chapter 24, Starr & Curtis' Annotated Statutes of Illinois, 1 Vol., pp. 462–3, provides as follows:

"Sec. 1. The city council in cities, and president and board of trustees in villages, shall have the following powers," * * * (among others):

"*Seventh.* To lay out, establish, open, *alter*, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and *vacate* the same."

Sec. 3, Chap. 109, of Plats, p. 1764, provides:

"The acknowledgment and recording of such plat shall be held in law and equity to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public," etc., etc., "and the premises intended for any street, alleyway, common or other public use in any city, village or town or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended."

Sec. 14, Chap. 115, of Plats, p. 1,986, provides:

"It shall be unlawful for any recorder to record any map, plat or subdivision of land situated in any incorporated city, town or village, until the same shall have been approved by the legislative authority of the city, town or village," etc., etc.

3.

The approval of a plat of subdivision by the president and board of trustees of a village of any lands situate therein is clearly among the powers given to them by these sections of the statute; and, certainly, *so far as the streets and boundaries of the streets are involved, their power is full and plenary for all purposes.*

The Supreme court of Illinois in *Dunham* v. *Hyde Park*, expressly say:

"The corporate authorities of Hyde Park are vested with complete control over its streets. They may contract or widen them, whenever in their opinion, the public good shall so require. Property owners purchase and hold subject to these powers, and they have no right to deny the widening, contracting or otherwise improving any street." (85 Ill., Rep. 569, quoting from page 577.)

Their approval is made a condition precedent to the validity and to the recording of any plat of subdivision of lands within their limits. Their approval, when duly made, has the effect of transferring the title—like a deed in fee simple—to the municipality of the land laid out in streets and alleys, on such plat.

It becomes more than a common law dedication. It is a statutory dedication. By the terms of the statute, therefore, such approval and acceptance by the legislative authority of the municipality operates as a deed in fee simple, by the party making the plat as a grantor to the corporation approving and accepting it, as the grantee. By its approval under seal, it became a party to the deed of dedication, and is bound by it until set aside.

We think we have shown already that there was no sufficient evidence to warrant the jury to find there had been any previous common law dedication by the plaintiff, or his ancestor, of the street as claimed by the defendant. But for the sake of illustrating the point, suppose there was some evidence tending to show there had been a common law dedication of a street twenty-three feet further north than the one dedicated by the plat of subdivision, we maintain that it was clearly within the legal powers of the president and board of trustees to accept the Statutory Dedication; and, thereby, to agree upon, fix and settle anew the true boundaries of the street.

Under the statute first cited, they had full power to "*alter*" the street, or even to "vacate" the same.

It follows, even if the street as opened in 1873, was legally dedicated by the plaintiff (which we stoutly deny), this act of approval by the president and board of trustees of September 8, 1882, waived or changed the street of 1873, and accepted and established the street as dedicated under the statute by the plat of 1882.

While that plat with their approval remains of record, the defendant is estopped from saying that the true boundaries of the street in question are not according to that plat. If there was any mistake in it, it could only be set aside by a proceeding in equity in the court which acted upon it in making its final decree.

VIII.

THE DEFENDANT WAS A QUASI PARTY TO THE DECREE AND BOUND BY IT.

The court erred in that part of his charge secondly excepted to by the plaintiff's counsel, to the effect that the final decree of the State court, based upon the approval of the plat by the president and board of trustees, *was not* binding upon the defendant. That part of the charge excepted to, is in these words (Rec., 40):

"The decree of partition required the report of the commissioners, as to subdivision, to be approved by the trustees of the village of Hyde Park, and upon the plat which accompanied the report and was made a part of it, a committee of the trustees recommended the approval of the subdivision; which was done, as appears by the following entry upon the plat: 'Approved by the president and board of trustees, this 8th day of September, 1882. E. W. Hendricks, village clerk.' This plat thus approved

was made a part of the report of the commissioners which the State court by its decree confirmed. But the village of Hyde Park was not a party to the suit for partition, and not being before the State court as a party, it was not bound as such by this proceeding."

He also erred upon the same point in refusing to give the VIIth instruction requested by the plaintiff (Rec., 44), involving precisely the same question.

1.

In this, we submit, the learned trial judge was clearly in error, both in the charge as given, and in refusing the instruction prayed for.

While it is true that the defendant was not made a formal party to the partition suit in the outset, yet the court, acting under the authority of the statute, before coming to a final decree directed the plat to be submitted to the defendant in its political capacity for approval. And it appears as the basis of its decree, that the court's own *officers or commisioners appeared before the legislative authority of the village of Hyde Park, and submitted the plat for their approval. The officers of the court obtained their approval.*

Such approval was before the court before its final decree. It was that approval of the defendant upon which the court relied in making its final decree, when it approved the plat and directed the same to be recorded.

In addition to the statutes already cited, we cite the following: Section 179, chapter 24, providing for submitting map or plat for approval, says:

"No such map, plat or subdivision shall be entitled to record in the proper county, *or have any validity, until it shall have been so approved.*"

Section 11, chapter 109, page 1768, Starr & Curtis' Annotated Statutes of Illinois, provides:

"That in any proceeding in any court of record in this state, * * * for partition of lands, * * * it shall be competent for the court to order * * * commissioners authorized to make partition of such lands, to cause such lands to be surveyed and subdivided and a map or plat of the same to be made. * * * Such map or plat shall be submitted to the court for his approval, and if approved by the court shall be recorded," etc.

SEC. 12. "Maps or plats made in conformity to the preceding section, when approved by the court, shall have the like authenticity as maps or plats of lands made by owners of the same, and shall be sufficient in law for all purposes whatever."

2.

The matter of platting subdivisions in cities and villages is a proceeding in rem. Of necessity it is a matter of public record, of which all the world is bound to take notice. More than that, a plat cannot be recorded and is of no validity until approved by the legislative authority of the municipality. The defendant, therefore, had full notice of the proceeding in court to make the plat. The defendant had power to prevent the recording and thereby making any valid plat. The defendant had full power to approve or to disapprove; and, if for any reason it disapproved, to appear in court and give valid reasons for withholding approval.

3.

Again, any party who is before the court *pendente lite*, and who acts under a decree, becomes *pro tanto* a party to the proceeding.

Requea v. *Rea*, 2 Paige, 339, 341.

The court acted, as it had the right to do, upon the act of the defendant approving the plat.

The court in the discharge of its duty appointed the commissioners to survey and plat the subdivision. In the performance of that duty, they submitted the plat to the president and board of trustees of the village of Hyde Park. Upon such submission the power and duty of that political body was called directly into exercise. It was called upon to do one of two things, either to approve or to disapprove. It acted, not ministerially, but in its legislative capacity, and it approved the plat submitted by the direction of the State court. It thereby acquiecsed in that plat. It voluntarily submitted their approval to that court as the basis of its decree. It declared by official act the survey and plat made by Greeley to be right as surveyed and staked, including streets and alleys, and duly accepted the statutory dedication of those streets and alleys.

4.

If there was any mistake it could appeal to the court which acted upon their approval to correct the mistake. But so long as it remains of record as their official act there is no escape from the conclusion that they are legally bound.

We are aware that Henry J. Goodrich, one of the commissioners in partition (Rec., 7), states the reasoning of certain members of the board of trustees when they approved the plat. They said they would "approve the "plat as it came from the court, and if there was any "question in regard to the correct line of the street that "was to be settled as a matter of law by subsequent ad-"judication." But the most that can be claimed from

this is, that some members of the board mistook, not the facts of the case, but the legal effect of their act of approval.

We insist that the motives or reasons for an official act by a political body cannot be called in question to set aside the act itself in a collateral proceeding.

In this action at law in ejectment, the question of a mistake of the law by members of the board of trustees as to what would be the effect of their deed of approval, and after that deed of approval has been acted upon by another court of competent jurisdiction, and has been directly passed upon and its validity affirmed, cannot be raised collaterally.

The question of its validity could only be raised by a direct proceeding in that or some other competent court, to set aside the deed or act of approval on the ground of mistake, or for other sufficient cause.

Until thus set aside by a direct proceeding, it is binding and conclusive upon the defendant, in all other courts.

The state court in good faith acted upon the solemn declaration of the president and board of trustees of the village of Hyde Park in their deed of approval.

It would be an imposition upon that court, if the defendant is now permitted to say, that it disapproves now what it then said, to that court, and to all the world, by its official act, and upon the faith of which that court acted in making its final decree.

5.

It seems to us no sufficient answer to say that in the suit in partition, the defendant was not in the beginning, made a formal party; that no summons was served upon it; that

no formal answer or pleading was filed before its first interlocutory decree appointing commissioners to make partition.

The deed of approval, duly executed in an official matter, by the president and board of trustees who alone had the power to approve or to disapprove, was before the court, and acted upon by the court, and was made the basis of its final decree. Under the statute the defendant by its legislative authority acted under and submitted itself to the jurisdiction of the court. It cannot say it was a stranger. It became a *quasi* party to the final decree, as much so as a purchaser of real estate under a sale or foreclosure by an officer of the court, is a party to the decree of confirmation.

Though such purchaser was not a formal party to the suit, though no summons was served on him, though he made no formal appearance by plea or by answer before the decree of foreclosure, yet could any one doubt that a purchaser under a decree of sale *is bound by the final decree confirming that sale* because he was not made a formal party to the suit in the beginning?

This question has been answered many times. It was decided by Lord Eldon in *Lansdown* v. *Elderton*, (14 Vesey, 512,) that a purchaser by signing the terms of purchase under a decree "submitted himself to the jurisdiction of the court."

In *Gray* v. *Gray*, (1 Beavan, 199,) the same doctrine was laid down. That was affirmed in *Harding* v. *Harding*, (4 Myl. & Cr., 514,) and on appeal by Lord Lyndhurst.

This ruling of the English chancery is also the admitted American doctrine in equity. It was so expressly decided

in *Requea* v. *Rea*, (2 Paige, 339, p. 341.) The chancellor stated the rule in these words:

"When a person becomes a purchaser under a decree, he *submits himself to the jurisdiction of the court in that suit, as to all matters connected with such sale or relating to him in the character of purchaser.*"

Now all that we contend is, that the village of Hyde Park, by approving said plat of partition, submitted itself to the jurisdiction of said court as to all matters connected with the plat, which related to or affected the boundaries of the streets and alleys, over which its legislative authority had control. By its own act it became a party to the final decree of said court and became bound by it, as to the *true boundaries of the streets and alleys upon said plat.*

In *Miller* v. *Collyer*, 36 Barb., N. Y., 250, the Supreme court of New York decided that the memorandum of sale signed by the purchaser upon a judicial sale is not a contract with the plaintiff, whereon a suit can be brought; nor with the sheriff who makes the sale; but it is "*merely* "*a submission by him to the jurisdiction of the court in the* "*foreclosure suit, as a purchaser therein.*"

It follows, therefore, that so long as that decree stands, the defendant is bound by it, and the plaintiff entitled to recover.

IX.

THE COURT ALSO ERRED IN NOT GIVING TO THE JURY THE EIGHTH INSTRTCTION, REQUESTED BY THE PLAINTIFF. (Rec., 44–45), WHICH IS IN THESE WORDS:

"That the line of survey, as made by McClellan" (McLennan, the surveyor of the defendant), "locates the south line of the north-west quarter of the north-east quarter ten feet south of the line of the premises described in the

declaration, and, whichever theory of the surveyors be correct, the plaintiff, in the absence of any clear proof of an intention on his part to dedicate the premises as a public street, is entitled to recover."

XI.

THE COURT ERRED ALSO IN REFUSING TO GIVE THE THIRD INSTRUCTION, REQUESTED BY THE PLAINTIFF.

That instruction was in the following words:

"That the only proper course for the defendant to pursue when real estate is sought for public purposes as a street, which is held by minors as co-tenants, is by proceeding to condemn, wherein minor heirs may be brought before a court and have guardians duly appointed."

X.

THE COURT ERRED IN ITS RULINGS AS TO THE ADMISSION OF EVIDENCE AGAINST THE PLAINTIFF, WHICH WAS DULY EXCEPTED TO.

1.

The deed of Edward McKey was not competent evidence against his minor co-tenant. (Rec., 27.)

2.

The plaintiff objected to all testimony to show by the declaration or acts of Edward McKey anything like a common law dedication, for the reason that Michal F. McKey, the ancestor of the plaintiff, died in 1868, five years before the street was claimed, and because the plaintiff was then a minor, and had not become a resi-

dent of Chicago until 1888; which objection was overruled by the court, to which ruling counsel for the plaintiff then and there duly excepted.

XII.

THE COURT ERRED IN REFUSING TO SUBMIT ANY OF THE QUESTIONS OF FACT TO BE SPECIALLY FOUND BY THE JURY, WHICH WERE PREPARED AND SUBMITTED FOR THAT PURPOSE TO THE COUNSEL FOR THE DEFENDANT, AND TO THE COURT, BEFORE THE COMMENCEMENT OF THE ARGUMENT TO THE JURY, ACCORDING TO THE STATUTE OF THE STATE OF ILLINOIS, AND THE CONFORMITY ACT. REC., 31, 32.)

Section 1 of an act in relation to verdicts of juries in civil cases, in force July 1, 1887 (Hurd's Revised Statutes of Illinois, 1889, pp. 1018, 1019), is as follows:

"That in all trials by jury in civil proceedings in this state, in courts of record, the jury may render, in their discretion, either a general or special verdict; and in any case in which they render a general verdict they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury."

Sec. 2. "Submitting or refusing to submit a question of fact to the jury when requested by a party as provided by the first section hereof, may be excepted to and reviewed on appeal or writ of error as a ruling on a question of law."

Sec. 914 of the Revised Statutes of the United States says:

"The practice, pleadings, and forms and modes of pro-

ceedings in civil causes, other than equity and admiralty causes, shall conform, *as near as may be*, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state," etc.

The laws of the state provide for a special finding of the jury when requested by any party, in its courts.

The federal law requires the federal court to conform as near as may be.

The court refused to conform at all to the law of the state as to a special finding by the jury. We submit, in this there was error.

Respectfully submitted.

J. R. DOOLITTLE,
Of Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 1421.

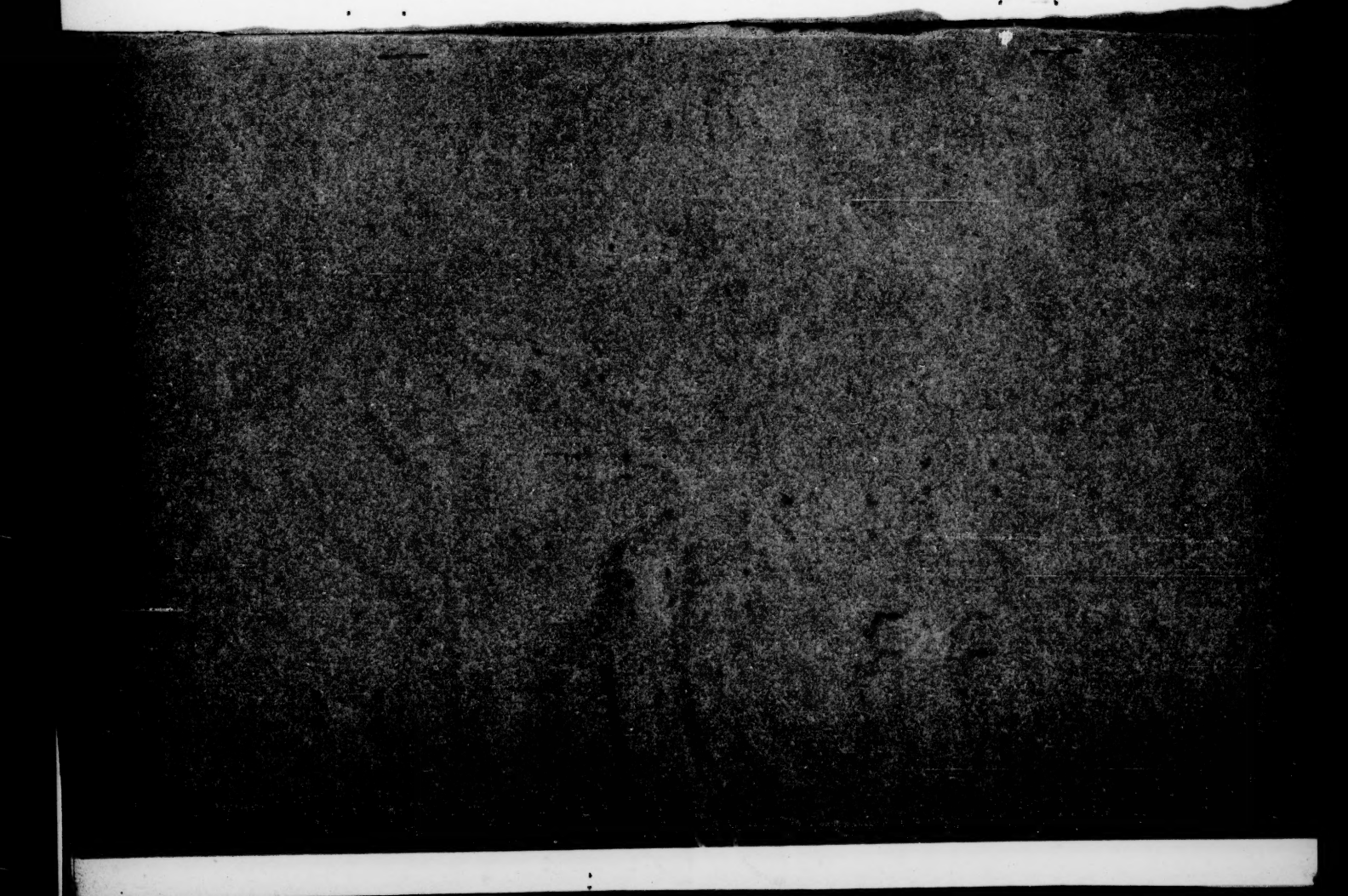
WILLIAM D. McKEY,
Plaintiff in Error,
vs.
THE VILLAGE OF HYDE PARK,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR.

JAMES H. ROBERTS,
ATTORNEY FOR DEFENDANT IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.



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WILLIAM D. McKEY, *Plaintiff in Error,*
vs.
THE VILLAGE OF HYDE PARK, *Defendant in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

This was an action of ejectment brought by the plaintiff in error against the defendant in error to recover the possession of a strip of land twenty-three feet north and south on Grand Boulevard by one hundred and fifty feet east and west on 41st street, and which since 1873, has been continuously used and occupied by defendant in error as a portion of 41st street, a public highway in said village. The plaintiff contended that in locating said street, the village had placed it twenty-three feet too far to the north and to that extent enroached upon his land, while the defendant insisted that the street was correctly located, and that the twenty-three feet involved in

this suit was rightfully included within the limits of the street. In the court below judgment was given for the defendant.

The Title.

The land in controversy is in the south ten acres of the North West quarter of the North East quarter of Section three (3), Township thirty-eight (38), North, Range fourteen (14), East, of the third Principal Meridian in Cook County, Illinois.

P. F. W. Peck purchased the North West quarter of the North East quarter from the trustees of the Illinois and Michigan Canal, and received from them the usual certificate of purchase, dated May 10, 1849, describing the land, reciting the terms upon which he would be entitled to a deed, and that the land contained "forty acres, more or less." (Rec., 10.)

Subsequently, and on May 26, 1853, Peck received a deed conveying the property by the same description "containing forty acres, more or less." This deed was recorded in the recorder's office of Cook county, May 27, 1853. (Rec., 11.)

By mesne conveyances the title to the south ten acres of the tract became in June, 1866, vested in Edward McKey and Michael McKey, as tenants in common (Rec., 5), and so remained until the death of Michael McKey, intestate, September 19, 1868. (Rec., 21.)

Michael and Edward McKey were brothers and resided in Janesville, Wisconsin. Upon the death of Michael, his interest in the ten acres descended to his four children, the oldest of whom, William D. McKey, the plaintiff in error, reached his majority in September, 1874.

(Rec., 21.) Edward McKey died intestate August 14, 1875. (Rec., 21.)

By deed dated November 4, 1872, and recorded in said recorder's office March 5, 1873, Edward McKey conveyed to the village of Hyde Park, defendant in error, "for the purpose of a public street or highway," all of his interest in that part of the south thirty-three feet of this ten acre tract, describing it as "the south thirty-three (33) feet of that portion of the north-west quarter (¼) of the north-east quarter of said section three (3), lying west of Vincennes avenue"; and by the same instrument George S. Bowen, the owner of the south-west quarter of said section, conveyed to the village for a like purpose, the north thirty-three feet of his land, thus dedicating to the public use a strip of land sixty-six feet in width to be used as a street. (Rec., 27).

In 1873 the village of Hyde Park opened the street, as contemplated by the deed last referred to, taking, as it contends, thirty-three feet from the south portion of the McKey tract and thirty-three feet from the north portion of the Bowen tract, making a street sixty-six feet wide known as 41st street. (Rec., 23.) Plaintiff in error insists, however, that the village took only *ten feet* from the Bowen tract, and took *fifty-six feet* from the McKey tract, and he is seeking in this action to recover the possession of the twenty-three feet improperly taken, as he contends.

In 1881 or 1882, proceedings were commenced in the Circuit court of Cook county, Illinois, for the partition of the McKey tract among the several owners. *The village of Hyde Park was not a party to this partition suit* (Rec., 6), although it had continued to use and occupy the south thirty-three feet of the tract as a street since 1873.

In this proceeding the court appointed commissioners to partition the land and authorized them to subdivide it into blocks, lots, streets and alleys, which they did, the plat attached to the record entitled "McKey's Addition to Hyde Park," being their subdivision. This plat was presented to the trustees of the Village of Hyde Park, and was by them approved, as will appear by the memorandum on the plat. This subdivision so recommended by the commissioners, was reported to the court and adopted by it in its final decree entered in the partition proceedings October 6, 1882. (Rec., 21, 22.)

By the partition decree, the land in controversy in this suit (described as lot 11 and the south two and fifty hundredths feet of lot 10 in block 1 in McKey's Addition to Hyde Park), together with other portions of the tract, were allotted in severalty to plaintiff in error. (Rec.,22.)

The center line of 41st street, as shown on the plat of "McKey's Addition to Hyde Park," does not coincide with the center line of the street as actually laid out and used, but falls twenty-three feet south thereof; so that, as a matter of fact, lot 11 and the south two and one-half feet of lot 10 in block 1 of the subdivision fall within the limits of the street as used.

Both parties to this controversy agree that the center line of the street should be the dividing line between the north-west and the south-west quarters of section 3, and one of the questions to be determined in the true location of that line.

I.

THE CENTER LINE OF 41ST STREET, AS LAID OUT BY THE VILLAGE OF HYDE PARK IS THE TRUE SOUTHERN BOUNDARY OF THE M'KEY TRACT.

The evidence is conflicting. The witnesses, Greeley and Carlson, for the plaintiff in error, place the line twenty-three feet south of the center of the street as used, while McLennan, Rossiter, Lee and Foster, called in behalf of defendant, placed it in the center of the street as used. These men are surveyors of experience, but had different theories as to the method of ascertaining the quarter quarter line.

Jacob T. Foster, county surveyor, said, that "If he "were called upon to survey the north-west quarter of "the north-east quarter, containing forty acres, more or "less, he would ascertain the southern line of the quarter "by measuring the west line of the quarter section and "dividing it in the middle, then measuring the east line "of the quarter section and dividing it in the middle, and "run a line through from one point to the other, so that "if the west line of this quarter section was 2,622½ feet "long he would make the west line of the quarter quar-"ter one-half of that, and make the south line of the "quarter quarter that many feet south of the north line. "That is the true principle in surveying." (Rec., 26.)

The witness McLennan, a surveyor for thirty years, testified that "if this north-east quarter of section 3 be "subdivided into four quarters by dividing the quarter "section by equally distant lines, such a survey would "locate 41st street in exactly the position where it is now

"occupied by the village, and in that case, the true line "between the north-west quarter and the south-west "quarter of this north-east quarter of the quarter section "would be in the center of 41st street as now laid out "and occupied." (Rec., 23.)

Defendant's other witnesses testified to the same effect. (Rec., 22 to 26.)

Samuel S. Greeley, who made the survey for McKey's addition, was called by the plaintiff and testified that "he "proceeded on the theory that the canal trustees had "conveyed eighty acres in the north part of the quarter "section, and four times $19\frac{31}{100}$ acres or $77\frac{23}{100}$ acres in "the south part of the quarter section and if there had "been exactly $157\frac{23}{100}$ acres in the quarter section as "was originally shown by the government plat, the north "half would have been entitled to its full eighty acres, "and the south half would have to stand the shortage "and receive nearly $77\frac{23}{100}$ acres; that as there was a "surplus in the quarter section east and west the north "80 was entitled to its full share of the surplus, and the "south $77\frac{23}{100}$ was entitled to its share of the surplus; in "other words, he divided up the actual acreage in the "quarter section which was found to be in excess of the "160 acres by giving the north half of the Section $\frac{80}{157}$ "of the actual acreage, which would make something over "eighty-one acres; and by giving to the south half 77 and a "fractional $\frac{1}{157}$ of the actual acreage, which would make "in the south half 78 and a fraction acreage and that he "had put the dividing line between the north half and the "south half of the quarter section on a line so as to throw "this proportionate acreage respectively into the north and "south half of the quarter section." (Rec., 15 and 16.)

He further testified that "if he had surveyed, making

" the south line of the quarter half way between the north " and south lines of the quarter section, he would have " laid out the street as it is now laid out by the village " authorities, and that if he had measured the distance " and divided the quarter section without regard to acre- " age the south line of the McKey tract would have come " twenty-three feet further north than he had actually put " it."

That Mr. Greeley's theory is wrong needs no argument. He made the mistake of allowing the quantity of land described in the deed to govern instead of the description, and the rules for ascertaining the true boundaries of a quarter quarter section are too familiar to need discussion. Undoubtedly the south line of the McKey tract is the center line of 41st street as laid out by the village authorities.

II.

WAS THERE A DIVISION FENCE BETWEEN THE MCKEY TRACT AND THE LAND ADJOINING IT ON THE SOUTH PLACED THERE BY THE RESPECTIVE OWNERS IN SUCH A WAY AS TO SUBSTITUTE FOR THE GOVERNMENT BOUNDARY LINE, ANOTHER AND DIFFERENT LINE, AND IF SO WHERE WAS THAT FENCE?

The evidence introduced to establish the existence of an old division fence upon the line claimed by plaintiff as his true southern boundary, is very slender. It cannot for a moment bear the scrutiny necessary to override the government lines. It nowhere appears that this fence was recognized as the true boundary line by the respective owners on either side.

As the learned judge who presided at the trial observed in his charge to the jury, "the law calls for clear "proof in support of an agreement between adjoining "proprietors for the establishment of a boundary line "different from the true one."

Henry McKey, a son of Edward McKey, and who has all along had charge of the McKey property, testified (Rec., 28) that when he saw the street opened he supposed it was opened on the right line and that the fence was wrong; that it was a mistake and the land had not been fenced right, and that he never discovered the actual condition of things until, during the course of the partition proceedings, Mr. Greeley, the surveyor, told him of the error. This was about nine years after the opening of the street. So that the McKeys themselves had no settled conviction that the old fence established a boundary line between their land and the tract adjoining them on the south.

III.

THE VILLAGE OF HYDE PARK HAS THE RIGHT TO USE THE LAND IN CONTROVERSY FOR THE PURPOSE OF A PUBLIC STREET BY VIRTUE OF THE DEED FROM EDWARD MCKEY, BY COMMON LAW DEDICATION AND BY STATUTORY DEDICATION.

In 1873 the village of Hyde Park extended 41st street through the land in question. No formal proceedings were had, but the street was opened in pursuance of the deed from Edward McKey an owner of an undivided half of the McKey tract. (Rec., 27.)

Plaintiff made no objection to the opening of the street. True he was a minor at that time, but he became of age

the following year, and he did not see fit to object then nor until the commencement of this suit in 1887. He has allowed the village to open and improve the street, to lay sidewalks, and put in sewers and when this is all done, after fourteen years of acquiescence, he, for the first time, asserts his claim.

This long period of acquiescence, with full knowledge of the fact that the village was using the land as a street, must operate as an affirmation of the deed of dedication executed by his uncle in 1872.

The evidence is that the only agent the McKeys had in the management of this property was Henry McKey, a son of Edward McKey and a cousin of the plaintiff.

While it may be conceded that Henry McKey had no power as such agent to dedicate this land to the public, still his knowledge must be regarded as the knowledge of his principal, and the principal knowing that this land was being used by the public as a street, made no objection, but acquiesced in such use.

Henry McKey was present at the time the street was being laid out. (Rec., 28.) He says he saw that the fence had been moved, and that more of the street was taken from the McKey tract than from the land adjoining it on the south, but he adds that he thought the location of the fence might have been wrong and made no objection. (Rec., 28.)

Plaintiff is visited with the notice which his agent had, and is estopped to deny that the street was opened with his consent. He was a witness in this case, but did not undertake to deny that he knew this land was being used as a street.

As a matter of fact, plaintiff and the other McKeys have

all along been ready to give the south thirty-three feet of their land for a street, and Henry McKey, their agent, and one of the counsel in the court below, virtually concedes in his evidence that he and all the parties interested desired and assented to the opening of 41st street through their land, and to the taking by the public of thirty-three feet thereof. They assented in fact to the use and occupation of all the land now occupied by the street at the time it was located. But plaintiff now claims that this assent was made under the erroneous supposition that he was giving only thirty-three feet instead of fifty-six, as he insists the village has taken.

We reply, that even if the village had taken fifty-six feet, the plaintiff having assented during this long term of years, and having without objection, permitted the public as well as private individuals to acquire rights with reference to the street, cannot now be heard to say that he made a mistake when he gave his original consent.

But as a matter of fact there was no mistake, and the supposition of the McKeys that the village was only taking thirty-three feet of their land was correct.

Until informed by Mr. Greeley that the street as opened was not where the McKeys might have placed it, they never questioned its location, nor until that time did they ever seek to avoid their common law dedication. Now, as we have endeavored to show heretofore, Greeley was wrong and in fact the street did and does lie exactly where Henry McKey thought it ought to be, and where plaintiff by his acquiescence consented that it should be.

It appears (Rec., 25) that there are nine houses on the McKey tract between Vincennes avenue and Grand

boulevard, fronting south on 41st street, as located by the village, and seven or eight houses in this same tract east of Vincennes auenue, fronting south on 41st street; that there is a house on the north-east corner of 41st street and Vincennes avenue, fronting west on Vincennes avenue with the side on 41st street, located only three or four feet north of the north-line of 41st street as now laid out, with a sidewalk immediately south of it. (Rec., 25,) All of these houses have been built upon the faith that the location of the street was correct.

The evidence shows that the land in controversy has been used by the public as a street with the knowledge and acquiescence of the owner for nine years before the plat was recorded, and for four years after that before this suit was commenced.

Does not this evidence show a common law dedication of this street by the McKeys?

No particular formalities are required to make a common law dedication. It is a question of intention on the part of the owner, and this intention may be evidenced by the assent of the owner to its use by the public with his knowledge for such a length of of time that the public accommodation and private rights might be materially affected by an interruption of this enjoyment.

City of Cincinnati v. *The Lessee of White*, 6 Peters, 453, and cases there cited.

In that case the court in referring to the case of *Jarvis* v. *Dean*, 3 Bingham, 447, say: "The point, therefore, upon "which the establishment of the public street rested was "whether it had been used by the public as such with the "assent of the owner of the soil; not whether such use "had been for a length of time which would give the

"right by force of the possession; nor whether a grant "might be presumed, but whether it had been used with "the assent of the owner of the land; necessarily imply- "ing that the mere naked fee of the land remained in the "owner of the soil, but that it became a public street by "his permission to have it used as such. Such use, how- "ever, ought to be for such a length of time that the "public accommodation and private rights might be ma- "terially affected by an interruption of the enjoyment."

"There is no particular form or ceremony necessary "in the dedication of land to public use. All that is re- "quired is the *assent of the owner of the land, and the "fact of its being used for the public purpose intended by "the appropriation.* This was the doctrine in the case of "*Jarvis* v. *Dean*, already referred to with respect to the "street, and the same rule must apply to all public dedi- "cations; and *from the mere use of the land, as public "land thus appropriated, the assent of the owner may be "presumed.*"

From use, with the assent of the owner, the law presumes a dedication, the use being for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

Mayor v. *Franklin*, 12 Ga., 239.
Case v. *Favier*, 12 Minn., 89.
Cady v. *Conger*, 19 N. Y., 256.

"In some cases a dedication of property to public use, "as, for instance, a street or public road where the public "has enjoyed the unmolested use of it for six or seven "years, has been deemed sufficient evidence of dedica- "tion."

Barclay et al. v. *Howell's Lessee*, 6 Peters, 513.

If the owner of land intentionally or by gross negligence leads the public to believe that he has dedicated the premises to public use, he will be estopped from contradicting his representations to the prejudice of those he may have misled.

Wilder v. *City of St. Paul*, 12 Minn., 192.
Forney v. *Calhoun County*, 84 Ala., 215.

A dedication once made cannot be recalled, and *the intention of the owner at the time is to be considered, not his intention at any subsequent time.*

Ruch v. *City of Rock Island*, 5 Biss., 95.
Adams v. *Saratoga R. R. Co.*, 11 Barb., 414.

It appears in evidence that the land in controversy has been used as a street with the knowledge and assent of the owner for nine years before the plat was recorded, and for four years after that before this suit was brought.

Counsel says in his brief (page 31) that it is the settled law in Illinois that mere non action will not raise any implication of an intention to dedicate private property to public use. This is doubtless true, but it is equally true that where the owner of land by his conduct allows the public to use and improve it as a street, and by his acquiescence or neglect induces private owners to build with reference to it, he is equitably estopped to deny a dedication to the public. The cases cited by counsel in his brief show that such is the law in Illinois.

See

City of Chicago v. *Wright*, 69 Ills., 318.

The plat of "McKey's Addition to Hyde Park" shows that the owners intended to and did dedicate to the public use the south thirty-three feet of their land for the purpose of a street. The surveyor who made the plat and

surveyed the land thought that the south line of the McKey tract fell twenty-three feet further south than was originally supposed, and made the subdivision upon that theory. This plat, as was customary, was presented to the trustees of Hyde park for approval and was by them approved, evidently upon the supposition that the street indicated upon the plat coincided with the street then in use. They merely accepted a statutory dedication of what the village had for years enjoyed by common law dedication. The board of trustees could not by approving the plat vacate any part of the street nor surrender the public rights previously acquired, even had they known it to be what the plaintiff now claims.

Plaintiff in error seems to contend that by the approval of the plat, the defendant in error was irrevocably committed to the survey made by Mr. Greeley, and is bound by the decree in the partition suit, *to which it was not a party*, and is precluded from saying that the south line of the McKey tract is other than as indicated upon Mr. Greeley's plat. This position is wholly untenable.

IV.

THE PLAINTIFF HAS RECOGNIZED THE RIGHT OF THE PUBLIC TO THE STREET BY SELLING LOTS ABUTTING THEREON TO PERSONS WHO HAVE ERECTED HOUSES WITH REFERENCE TO THE PRESENT LOCATION OF THE STREET.

The evidence shows that plaintiff and others of the McKeys, by their deeds of conveyance, although conveying by the plat and by the description on the plat, have recognized the street as it now exists (Rec., 28, 29);

and in the deeds, instead of protecting themselves as they might have done, against a recognition by their grantees of the street as used by the village, they indicate their belief in the validity of the village's claim by inserting a clause that they do not warrant against the title of the village to such portions of the lots sold, as they assert, lie within the limits of the street.

Says Dillon on Municipal Corporations, Vol. 2, Sec. 502: "And if a street has been long used and built "upon a particular line, which line has been acquiesced in "by the adjoining owners who have built and made im- "provements to correspond with such line, such owners "and the public acquire rights in consequence, and one "or more of such owners can not afterwards change or "narrow the street by showing that the original survey "made the line of the street different from that which "had been long regarded, built upon and acquiesced in "as the line of the street."

We, therefore, respectfully insist that plaintiff in error, has effectually precluded himself from recovering in this action by his tacit affirmance of the deed of dedication made by his uncle, by his common law dedication, by his confirmation thereof through the statutory dedication and by his sale of lots abutting on the street to persons who, by the erection of buildings, have recognized the line of the street as it now exists.

Respectfully submitted.

JAMES H. ROBERTS,
Attorney and of Counsel for Defendant in Error.